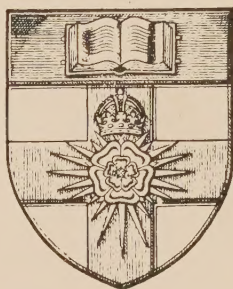


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IN THE
ADMIRALTY AND ECCLESIASTICAL COURTS,
AND ON APPEAL THEREFROM IN THE
PRIVY COUNCIL,
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1882.



JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLV AND XLVI VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Right Hon. Sir ROBERT PHILLIMORE, Knt.,
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JUDGES
OF
THE COURT OF APPEAL.
XLV AND XLVI VICTORIÆ.

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CASES
 DETERMINED BY THE
 PROBATE DIVORCE AND ADMIRALTY DIVISION
 OF THE
 HIGH COURT OF JUSTICE
 AND BY THE
 COURT OF APPEAL
 ON APPEAL FROM THAT DIVISION
 AND BY THE
 ECCLESIASTICAL COURTS
 XLV VICTORIÆ.

THE GAETANO AND MARIA. (1881 M. 1778 Fo. 214.)

1881
Nov. 11.

Bottomry—Foreign Ship—Necessity of Communication with Owners of Cargo
—Conflict of Laws.

In an action on a bottomry bond granted at a foreign port on ship, cargo, and freight the owners of the cargo pleaded that the master might have communicated with them before hypothecating the cargo, and that he had neglected to do so. The plaintiffs in reply alleged that the ship was an Italian ship, and that by the law of Italy such communication was not necessary.

Held, on demurrer, that the reply was bad in law.

The Hamburg (Br. & L. 253) followed.

A bond made at a foreign port hypothecating cargo laden on board a foreign ship, even though valid according to the law of the flag of the ship, will not be enforced by the Courts of the country unless the conditions imposed by English law as essential to the validity of such a transaction have been complied with.

Reverend on off part 7/12
 THIS was an action of bottomry instituted by the plaintiffs to recover a sum of money alleged to have been advanced at Fayal on the security of a bottomry bond granted by the master of the

1881 Italian ship 'Gaetano and Maria' on the said ship, her cargo, and
 --- THE freight.

GAETANO AND
 MARIA.

The owners of the cargo of the 'Gaetano and Maria' appeared as defendants in the action, and delivered a statement of defence in the 6th paragraph of which they alleged that the master before hypothecating the cargo might have communicated with the owners of the cargo, and that without any reasonable excuse he had neglected so to do.

The 4th and 5th paragraphs of the plaintiffs' reply were as follow :—

1. And by way of further reply to the several allegations in the 6th paragraph, the plaintiffs say that by the law of Italy, to which country the 'Gaetano and Maria' belonged at the time that the bottomry bond in question was executed, and at the time when it became due, the bottomry contract had to be entered into, and the said bottomry bond had to be executed, as they in fact were, in the presence and with the intervention and sanction of the Italian consul or consular agent at the port of Fayal, and that upon their being so entered into and executed they became and were valid and effectual to bind both ship and cargo, without any previous communication being made by the master to the owners of the ship or to the owners of the said cargo.

5. In the alternative the plaintiffs say in answer to the allegations in the same paragraph that by the law of Italy, to which country the 'Gaetano and Maria' belonged at the time aforesaid, a bottomry contract can be lawfully made and a valid bottomry bond can be executed without any previous communication with the owners of ship or the owners of cargo, and that all the formalities and conditions required by the Italian law in order to make a good and valid bottomry bond were complied with and satisfied before the said bottomry bond was executed.

The defendants demurred to the 4th and 5th paragraphs of the reply.

Nov. 3. *Myburgh* (Butt, Q.C., with him), in support of the demurrer. *The Hamburg* (1) governs this case: it has never been overruled or even doubted. The principle is clearly established

that persons seeking the aid of the Courts of this country to enforce a remedy against property within the jurisdiction, cannot be allowed to enforce such remedy unless they have observed the rules which the law of the tribunal imposes as a condition to the right to enforce the remedy. [He also referred to *Kleinwort v. The Cassa Marittima of Genoa*. (1)]

1881
THE
GAETANO AND
MARIA.

Charles Hall, Q.C. (W. G. F. Phillimore, with him). The existence of a maritime lien is not a matter which ought to be made to depend upon the *lex fori*. According to the law laid down in *Lloyd v. Guibert* (2), the rights of the parties are properly governed by the law of the flag. The question is, was there a valid contract of hypothecation as regards the cargo? That depends upon the nature of the transaction, and it ought to be decided upon principle without regard to the practice of the particular tribunal before which the question may be raised: *Pope v. Nickerson*. (3) The validity of the contract is in no respect a matter of procedure.

Cur. adv. vult.

Nov. 11. SIR ROBERT PHILLIMORE. The argument in this case arose upon demurrer, and the facts material to the demurrer, and taken, for the purposes of the argument, as true, are as follows:—The ‘Gaetano and Maria,’ an Italian ship, laden with cargo and bound for London, being in distress, put in at Fayal, in the Azores. Her master, whilst there, finding it necessary to raise money for the expenses of the ship, executed a bottomry bond for 2330*l.* 2*s.* 7*d.*, purporting to bind ship, freight, and cargo to one Antonio Coeltro, who thereupon advanced to him the above sum. The money was made payable, together with the maritime premium thereon, upon the safe arrival of the ship at her port of discharge. The bond was duly executed in the presence and with the sanction of the Italian consular agent at Fayal. Before executing the bond the master did not communicate with the defendants, who were then, and still are, the owners of the cargo, although it was reasonably practicable for him to do so. Antonio Coeltro subsequently indorsed the bond to the plaintiffs, who are the

(1) 2 App. Cas. 1567.

(2) Law Rep. 1 Q. B. 115.

(3) 3 Story, 465.

1881

THE
GAETANO AND
MARIA.

present holders of it. The 'Gaetano and Maria' shortly afterwards proceeded on her voyage, and in May last arrived safely with her cargo at the port of London, and this action against her was commenced by the plaintiffs. It is now contended by the plaintiffs that as the ship is an Italian ship, and as the bottomry contract was duly entered into in the presence and with the sanction of the Italian consular agent, the case must be governed by the law of the ship's flag, that is, by the law of Italy, under which the master would have authority to bind the cargo owners by his bottomry bond, though executed without previous communication with them, whether such communication were practicable or not.

The contention of the defendants is, that their liability must be determined by the general maritime law as administered in England, and that under that law the bottomry bond, in the circumstances of the present case, would not be valid against them.

I am of opinion that the point raised is decided in favour of the defendants by the judgment of Dr. Lushington in *The Hamburgh*. (1) In that case the question was the validity, as against cargo owners, of a bottomry bond entered into by the master of a German ship, in circumstances very similar to those of the present case, and it was laid down by Dr. Lushington, who relies on Lord Stowell's judgment in *The Gratitude* (2), and in the case of *The Buonaparte* (3), that the general maritime law as administered in England was to be applied, and not the *lex loci contractus* nor the law of the ship's flag. This decision was affirmed, on appeal, by the Privy Council. The judgment of the Exchequer Chamber in *Lloyd v. Guibert* (4) was cited by the plaintiffs as impugning the authority of this decision, but Mr. Justice Willes, who delivered that judgment, expressly recognises and distinguishes the decision in *The Hamburgh* (1); moreover, the question in *Lloyd v. Guibert* (4) was, by what law a contract of affreightment, and not the right of a master to hypothecate cargo, should be governed. The plaintiffs also relied upon the case of *Pope v. Nickerson* (5), decided in the Circuit Court of the United States in 1844. There

(1) Br. & L. 253.

(3) 8 Moo. P. C. 459.

(2) 3 W. Rob. 240.

(4) Law Rep. 1 Q. B. 115, 125.

(5) 3 Story, 465.

are some observations of Mr. Justice Story in that case which may appear to favour the plaintiffs' contention, but I am clearly of opinion that I am bound by the decisions of this Court and of the Privy Council, to which I have referred. The position of law is clear that communication by the master with the cargo-owners, if reasonably practicable, is necessary to constitute an agency and enable him to hypothecate the cargo. The case of *The Ham-
burgh* (1) recognises this as settled law, and the question is put beyond doubt by the more recent case of *Kleinwort, Cohen, & Co.* v. *The Cassa Marittima of Genoa* (2), in which the previous decisions on this subject were referred to. I give judgment on the demurrer for the defendants.

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Judgment for the defendants.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Cooper & Co.*

G. B.

[IN THE COURT OF APPEAL.]

Dec. 1.

THE CITO.

Derelict—Right to Freight after abandonment of Ship.

By the abandonment of a ship by its crew during a voyage, without any intention to retake possession, a right is given to the owner of cargo on board to treat the contract of affreightment as at an end.

A ship with a cargo of resin in barrels, on a voyage from America to Rotterdam, was, owing to the perils of the sea, abandoned by her crew off the American coast. She was afterwards saved by another vessel, and brought with her cargo by the salvors into a port in England, and there arrested in an action for salvage by her salvors. Before the shipowner had released the ship or cargo, the owners of the cargo applied for and obtained from the Admiralty Court an order for the release of the cargo to them without payment of any freight, upon their giving bail to the salvors:—

Held, that the cargo owners were entitled to treat the contract of affreightment as at an end, and that therefore the order of the Admiralty Court was rightly made.

APPEAL from an order of Sir Robert Phillimore, the judge of the Admiralty Division, made in an action for salvage on behalf

(1) Br. & L. 253.

(2) Law Rep. 2 App. Cas. 156.

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of the owners of the Norwegian barque *Colonist* against the Norwegian barque *Cito*.

The *Cito*, when on a voyage from Wilmington, U.S., to Rotterdam, with a cargo of resin in barrels, was, owing to the perils of the sea, abandoned by her crew off the American coast. Some time afterwards she was fallen in with by the *Colonist*, which navigated her to Plymouth, where on her arrival she was arrested with her cargo and freight in an action for salvage by the owners and crew of the *Colonist*. An appearance in the action was entered on behalf of the owners of the *Cito*, and afterwards on behalf of the owners of the cargo, who then, and before the owners of the *Cito* had obtained a release of that ship, moved the Admiralty Court for an order that upon their giving bail to the salvors the cargo should be released to them without payment of any freight. This motion was opposed by the owners of the *Cito*, on the ground that it was an attempt to defeat their right to freight, and they offered bail for salvage of the cargo. The cargo had been shipped at Wilmington under a bill of lading, by which the cargo was to be delivered at the port of Rotterdam to the order of the shippers or their assigns, they paying freight at a specified rate.

Sir Robert Phillimore considered that he was bound by the case of the *The Kathleen* (1), and he accordingly made the order applied for by the owners of the cargo. The owners of the *Cito* appealed.

Stubbs (*Butt, Q.C.*, with him), for the appellants. The case of the *Kathleen* (1) is distinguishable, as in that case the cargo was a perishable one, and had it been carried on to the port of destination, the owner of it could not have received it in that state in which he had a right to have it. Here it was different; the cargo, which had neither been discharged nor sold, could have been taken on in the *Cito* to Rotterdam, and so the appellants could have earned their freight. If not distinguishable, *The Kathleen* (1) was wrongly decided. It is not a decision binding on this Court. When a ship, which by any accident from the perils of the sea has been abandoned during the voyage, has been after-

(1) Law Rep. 4 A. & E. 269.

wards brought with its cargo into a port of refuge, whether by its own crew with or without assistance, or by salvors as a derelict, if its cargo is not perishable, the shipowner has a right to carry the cargo on to its port of destination in that or any other ship, and so earn the freight. Should, however, the cargo owner desire to receive it at such port of refuge he is at liberty to have it, but only on payment of the full freight. The contract of affreightment is not destroyed by the abandonment of the ship: *The Cargo ex Galam*. (1) The shipowners have never refused to perform their contract, and notwithstanding the abandonment, their right to the possession of the ship has always continued in them, subject only to the right of the salvors. The Merchant Shipping Act, 1854, s. 468, shews that the property of a derelict still remains in the owner. In the present case the cargo has been improved in value by being brought to this country, and its owners have got all they practically wanted, and therefore they should pay freight, if not the entire freight, at least pro ratâ: *The Soblomsten* (2) and *The Teutonia*. (3) Both parties here are foreigners, and the contract was to be performed by bringing the cargo to a foreign port; therefore the cargo owners should shew that by the law of that port an abandonment of the ship has destroyed the contract and entitled them to the cargo at a port of refuge without payment of any freight. The presumption, in the absence of anything to the contrary, is that by the cargo owners claiming the cargo at such port, they have agreed to pay freight pro ratâ, and the case of *The Cargo ex Galam* (1) shews that the act of the Admiralty Court when moved by the cargo owner is to be treated as the act of the cargo owner.

Myburgh (*F. W. Raikes*, with him), for the respondents. The present case is undistinguishable from *The Kathleen* (4), and that case was rightly decided. There is no question here about liability for pro rata freight, for the vessel was abandoned so shortly after she had commenced her voyage, that it is really a liability to pay the whole freight or nothing. In the case of an abandonment the property in the derelict is gone from the owner, and at Common Law the derelict becomes the property of the

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(1) Br. & L. 167.

(2) Law Rep. 1 A. & E. 293.

(3) Law Rep. 4 P. C. 171.

(4) Law Rep. 4 A. & E. 269.

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Crown; at all events it belongs to the Crown when it is brought by the salvors into an English port: *Rex v. Property Derelict* (1); *The Dantzic Packet*. (2)

However it is unnecessary to contend for that here, as by the abandonment of the ship and cargo the contract of affreightment was gone. There was by the abandonment a deliberate intention by the shipowners not to perform their contract, and having parted with the possession of the ship and cargo they became unable to carry out the contract of affreightment, and before they had recovered possession, the ship and cargo had been taken and claimed by the salvors. The cargo owners can only now get their cargo by paying for its conveyance to this country by the salvors, and it would be inequitable to ask them to pay again for this in the form of freight.

Stubbs, replied.

BRETT, L.J. I am of opinion that the decision appealed from should be affirmed. Many interesting points have been discussed in this case about which it is not necessary to give any decided opinion. It has been said that such an abandonment of a ship as to make it a derelict together with a subsequent seizure by any one who finds it, makes such seizure the seizure of a droit of the Admiralty, and alters the property in the ship. If that were made out it would strongly support the case for the respondents; but I am not, however, prepared to say that such a proceeding would take the property in the ship out of the owner; and for the present purpose I will assume that it does not. It has been also urged that the abandonment of a ship puts an end to the contract of affreightment. I am not prepared to say it does. Suppose a wrongful abandonment, without its being occasioned by the perils of the sea, it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, so it cannot be said that it puts an end to the contract of affreightment.

It is sufficient, I think, for the determination of the present case, to say that by an abandonment of a ship without any intention to retake possession of it, the shipowner has, so far as he can, abandoned the contract, so as to allow the other party to it,

(1) 1 Hagg. Adm. Rep. 383.

(2) 3 Hagg. Adm. Rep. 385.

the cargo owner, to treat it as abandoned. Then, under these circumstances, the vessel having been abandoned was brought into the Port of Plymouth and arrested there by her salvors in the Admiralty Court. Whilst the vessel was in that position, so that her owners could not enforce the contract of affreightment against the cargo owners, the latter went to the Court of Admiralty and claimed to have the cargo released and given to them without payment of any freight, upon their giving bail to the salvors; and thus the cargo owners thereby sought to exercise their right to elect to treat the contract at an end. The shipowners, however, by a counter motion to the Court, endeavoured to prevent the cargo owners from exercising this right and asked to have the cargo delivered to them (they being ready to give bail for the same) in order that they might carry it to the port of destination and so earn the freight. Now it seems to me that the Court of Admiralty would have been wrong if it had deprived the cargo owners of their right to treat what the shipowners had done as an abandonment of the contract of affreightment, and therefore that the order which the Court made was a right one. We do not decide what would have been the result if after the ship had been brought in as it was by the salvors, and before the cargo owners had come in and exercised their right to the cargo, the shipowners had given bail for the ship and cargo and had carried the cargo on. It is not necessary to do so, and it is sufficient to place our decision on the other ground in order to determine this case and to support the order appealed from and the case of *The Kathleen*. (1) It follows from our decision that the cargo owners not having done any wrongful act are not liable for freight either pro ratâ or at all.

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COTTON, L.J. I am of the same opinion. Before the shipowners sought to get possession of the cargo after the arrest by the salvors, the cargo owners had intervened and applied for the cargo, and under those circumstances the Court of Admiralty was right I think in making the order which it made. It is true that the shipowners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to

(1) Law Rep. 4 A. & E. 269.

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the cargo owners to elect to treat the contract at an end, and the shipowners could not, in my opinion, after their abandonment have objected, if the cargo owners had found another vessel and taken the cargo on in it to the port of destination.

LINDLEY, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Cooper & Co.*

Solicitors for respondents: *Pritchard & Sons.*

W. P.

I ec. 20.

WATSON *v.* WATSON AND OTHERS.

Will—Construction—Residue.

The will of S. C. after bequeathing her property to A. C. and J. C., continued thus, “in case of the demise of either the said A. C. or J. C., I do hereby bequeath the same . . . to the survivor for her sole use and benefit during her or their natural lifetime” :—

Held, that the residue was not disposed of, and that A. C. and J. C. took only as tenants for life.

SARAH CLARKE, of the parish of St. Peter at Gowts, Lincoln, made her will on the 15th day of March, 1851, in her own handwriting, and in the following words.

“Through the goodness of God, I, Sarah Clarke, of the parish of St. Peters at Gowts, Lincoln, having become possessed of property in the present possession of several different persons, do hereby bequeath the same all and every of it to my dearly beloved sisters, Ann Clarke, spinster, of the parish of St. Peter at Gowts, and Jane Clarke, spinster, of the said parish of St. Peter at Gowts, and in case of the demise of either the said Ann Clarke or the said Jane Clarke, I do hereby bequeath the same all and every portion of the same property to the survivor for her sole use and benefit during her or their natural lifetime. This the last will and testament of me, Sarah Clarke, signed this fifteenth day of March, in the year of our Lord, 1851.

“Witnesses: Harriet Sharpe; Elizabeth Armstrong.”

The testatrix died on the 7th day of August, 1869, and, there

being no executor named in the will, letters of administration were granted on the 30th day of June, 1870, to Ann Clarke, as one of the sisters and next of kin of the deceased.

Ann Clarke survived her sister Jane Clarke, and died on the 27th day of November, 1880.

Ann Clarke and Jane Clarke had each made wills, and appointed Henry Watson sole executor.

Dec. 7. *Inderwick, Q.C.*, and *Pritchard*, on behalf of Henry Watson, moved the Court that letters of administration of the estate and effects of Sarah Clarke be granted to Henry Watson as representative of the residuary legatees. The sisters were not merely tenants for life as upon the true construction of the will the residue is bequeathed to them. In the events which have happened the will contains an absolute gift of the residue, the legatees not having died in the lifetime of the testatrix.

The testatrix by the first part of the will gives the property absolutely, and the words "in case of the demise of either," mean in the case of death in the lifetime of the testatrix: Jarman on Wills, 4th ed. vol. ii. p. 752; *Howard v. Howard* (1); *Schenk v. Agnew* (2); *Clark v. Lubbock* (3); *Slade v. Milner* (4); *Home v. Pillans* (5); *Cambridge v. Rous* (6); *Ommaney v. Bevan*. (7) Either the will constituted an absolute gift if neither died in the lifetime of the testatrix, or she intended that if one of her sisters died in her lifetime the share of the other sister should be limited to that sister's life to her separate use. The words "sole use," are equivalent to "separate use." Hawkins on the Construction of Wills, pp. 116, 117; *Adamson v. Armitage* (8); *Ex parte Killick*. (9)

Searle, for the next of kin. The residue is not disposed of. The ordinary meaning of the words will not admit of any other construction.

Bayford, for other parties interested.

Cur. adv. vult.

(1) 21 Beav. 550.

(2) 4 K. & J. 405.

(3) 1 Y. & C. 492.

(4) 4 Madd. 144.

(5) 2 My. & K. 15.

(6) 8 Ves. 12.

(7) 18 Ves. 291.

(8) 19 Ves. 416.

(9) 3 M. D. & D. 480.

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Dec. 20. THE PRESIDENT. I have referred to the cases cited in argument and have found some difficulty in construing this will, as it is a will drawn by a testatrix who was probably, almost certainly, ignorant of the exact meaning of the technical language which she used.

The testatrix leaves her property to her sisters Ann Clarke and Jane Clarke, and she says in "case of the demise of either I hereby bequeath all and every portion of the said property to the survivor for her sole use and benefit during her or their natural lifetime." Several cases have been cited, but it is not necessary to go through them seriatim, because they only establish the now accepted general rule which is expressed in the 48th chapter of Jarman on Wills so clearly that I think it will be better for me to read the passage than to give it in words of my own. He says (1) "where a bequest is made to a person with a gift over in case of his death a question arises whether the testator uses the words 'in case of' in the sense of 'at' or 'from,' and thereby as restrictive of the prior bequest to a life interest, i.e., as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one in the event of the death of the legatee on some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance naturally is the time of its happening; and such time where the bequest is immediate (i.e., in possession) necessarily is the death of the testator, there being no other period to which the words can refer." The cases cited only go to establish that rule, but do not solve the difficulty which arises in this case from the use of the concluding words of the will "during her or their natural lifetime." Some other cases were cited, the effect of which was to shew that the words were to be considered to mean for her separate use, but they also give no assistance in determining the meaning of those concluding words. The words "during her or their lifetime" cannot be

(1) 1 Jarman, 4th ed. vol. ii. p. 732.

rejected, nor can they by any reasonable transposition, if that were allowable, be limited in their effect, and I have therefore come to the conclusion that as they cannot be rejected they have the effect, though they are not strictly grammatical, of indicating that the estate must be taken by these persons for life only, and that there is an intestacy as to the reversion.

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Administration granted to the next of kin with the will annexed. Costs of all parties out of the estate.

Solicitors for plaintiffs: *Helder, Roberts, & Gillett.*

Solicitors for defendants: *Taylor, Hoare, & Taylor.*

R. A. P.

IN THE GOODS OF ELIZABETH WENSLEY, DECEASED.

1882

Jan. 24.

Administration—Insolvency of the Estate—Special Circumstances—20 & 21 Vict. c. 77, s. 73.

J. W., entitled to the property of his wife, E. W., who predeceased him, became indebted to the estate of J. P. The estate of E. W. afterwards became entitled to a share in the residuary estate of J. P.

The executrix of J. W. refused to take out letters of administration to E. W.'s estate, and a grant was necessary to enable the creditors of J. W. to obtain E. W.'s share of the residuary estate in satisfaction of their debt :

The Court granted (under s. 73 of 20 & 21 Vict. c. 77) administration of the estate of E. W. to a creditor of J. W.

JAMES PRING, by his will which was duly proved in 1841, left one seventh share of his residuary estate expectant upon certain life estates to his niece Elizabeth Wensley the elder. :

Elizabeth Wensley, the elder, died in September, 1844, intestate, leaving her husband, John Wensley, her surviving.

John Wensley did not obtain letters of administration to the estate of his wife, and died in January, 1871, leaving a will which was duly proved by his daughter Elizabeth Wensley the younger, as sole executrix.

John Wensley during his lifetime became indebted to the estate of John Pring in a sum of 456*l.*, and a sum of 430*l.*, the share of Elizabeth Wensley the elder, his wife, in the residuary estate of

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OF WENSLEY.

John Pring, had now been paid into the Court of Chancery under the Trustee Relief Act.

The applicant, Susanna Pring, who was entitled to a share in the residuary estate of John Pring, claimed that Elizabeth Wensley the elder's and therefore her husband's share in that estate should be made answerable for the debt of John Wensley, to that estate, and for that purpose it was now necessary to obtain a representation to the estate of Elizabeth Wensley the elder.

There was no settlement or agreement for a settlement upon the marriage of Elizabeth Wensley the elder with John Wensley and therefore all her estate belonged to him.

Elizabeth Wensley the younger, as executrix of John Wensley, was the proper person to take out letters of administration to Elizabeth Wensley the elder, but she had been cited and had refused to do so.

Middleton, on behalf of Susanna Pring, moved that letters of administration of the personal estate of Elizabeth Wensley the elder, should be granted to the said Susanna Pring.

THE PRESIDENT. In this case the person entitled to represent the estate refuses to do so as she has no interest in it; but some one ought to be appointed to take out letters of administration so that the money due to the estate may be received. I think, therefore, that this is a case in which in the words of s. 73 of 20 & 21 Vict. c. 77, "it is necessary or convenient by reason of the insolvency of the estate of the deceased or other special circumstances to appoint some person to be administrator of the personal estate of the deceased other than the person who would have been entitled to the grant."

I make the grant accordingly.

Solicitor: *T. H. Strangways.*

R. A. P.

WHITTAKER v. WHITTAKER.

1881

*Attachment of Debt—Judicature Act, 1873, s. 25, subs. 8.**Dec. 20.*

Under subs. 8 of s. 25 of the Judicature Act, 1873, the Court of Divorce has power to attach a debt due to a respondent in order to compel obedience to an order of that Court for payment of costs.

THIS was a suit in which the Court had made a decree absolute for dissolution of marriage, and had ordered the respondent, the husband, to pay to the petitioner's solicitors two sums of 79*l.* 18*s.* and 2*l.* 10*s.* 4*d.* for costs.

The order had not been obeyed, and it appeared upon affidavit that the Lancashire Cotton Spinning Company, Limited, were indebted to the respondent in two separate sums of 800*l.* and 100*l.*

Middleton applied in chambers for an order nisi attaching those debts as against the company, and for an order nisi against the respondent for a receiver. He relied upon the Judicature Act, 1873, s. 25, subs. 8 (1) and *Smith v. Cowell*. (2)

The Court made the order accordingly.

Solicitors: *Gregory, Rowcliffe, & Co.*

(1) Sub-s. 8: A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

(2) Law Rep. 6 Q. B. D. 75.

R. A. P.

1882

Jan. 13.

L. v. L., FALSELY CALLED W.

Nullity—Impotence—Possible cure.

After a partial cohabitation of two years and eight months it appeared that the woman was impotent, but that she might probably be cured if she would submit to an operation involving no great risk to life. This she refused to do. The Court made a decree nisi of nullity of marriage.

THIS was a petition for nullity of marriage at the suit of the man. The respondent did not appear.

A ceremony of marriage was performed between the parties on the 29th of August, 1876, the man being then twenty-seven and the woman twenty-three years of age. After the ceremony she refused to accompany him home, but a week afterwards they slept together at her father's house for three or four nights, when she objected altogether to any attempt to consummate the marriage, and on one occasion threatened to leave the house. They then lived in separate lodgings, he visiting and sleeping with her about once a fortnight, but making no further effort to have connexion with her. She told him that she was not fitted for it, and had no sexual desire. This state of things continued for two years and eight months, when they finally separated. In February, 1879, she was examined by a medical man, who gave evidence that she was suffering from vaginismus, that there was a spasmodic affection of the parts which were extremely painful to touch, and that connexion was then impossible, but that a cure might be effected with no great risk to life. The respondent was informed of this, and was requested to submit to the operation, but refused. The petitioner was inspected under the order of the Court, and the inspectors stated that his condition was normal. The respondent refused to obey the order of the Court and undergo further inspection.

Dr. Tristram and *Currie*, for the petitioner, cited *D. E. v. A. G.* (1); *W. v. H.* (2); *G. v. G.* (3)

THE PRESIDENT: In this case the man is capable, and it is

(1) 1 Robert, 279.

(2) 2 S. & T. 240.

(3) Law Rep. 2 P. & D. 287.

proved to my satisfaction by the conduct of the parties during the last five years, and the medical testimony, that the woman is incapable. The ends of marriage have not been attained, and it is therefore desirable that the tie between the parties should be put an end to. The difficulty might perhaps be overcome if the lady would undergo an operation, which would probably be successful. But the Court cannot compel her to submit, and the man can only be expected to take all reasonable means to persuade her. This he has done, and she has distinctly refused. I therefore make a decree nisi for nullity of the marriage.

Solicitors : *Burton & Co.*

R. A. P.

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DAGG v. DAGG AND SPEAKE.

Jan. 19.

Dissolution of Marriage—Desertion by Petitioner.

A husband, without reasonable excuse, obtained from his wife an agreement that they should live apart from each other, which they accordingly did, and she subsequently committed adultery :—

Held, that under the circumstances he had deserted her, and that a petition by him for dissolution of the marriage must be dismissed.

THIS was a petition by William Pritchard Dagg, a pianoforte tuner, for dissolution of his marriage by reason of his wife's adultery. Neither the respondent nor co-respondent appeared.

In 1867, the petitioner was a porter, and the respondent cook at a hydropathic hospital, and, she being with child by him, they agreed to be married. Before the marriage, the following document in the handwriting of the petitioner, was signed by the parties, viz. :

"This is to certify that whereas the undersigned parties do agree that they will marry, and that only to save the female of us from shaming her friends or telling a lie, and that the said marriage shall be no more thought of, except to tell her friends that she is married (unless she should arrive at the following accomplishments—viz., piano, singing, reading, writing, speaking, and deportment); and whereas these said accomplishments have in no way been sought after, much less mastered, therefore the aforesaid marriage shall be and is null and void; and whereas we

'1882 agree that the male of us shall keep his harmonium in the afore-
DAGG said female's sitting room, we agree that it shall be there no more
v. than four months, and that from that time the aforesaid and
DAGG. undersigned shall be free in every respect whatsoever of the
aforesaid and undersigned female, as witness our hands this 1st of
—, 1867.

“ Catherine L. H. Jeffries.

“ William Pritchard Dagg.”

A month after the marriage the respondent was delivered of a child, at a lodging taken for her by the petitioner; but he had had no further intercourse with her. He paid her 2s. 6d. a week until recently, when he discovered that she had been for some years living in adultery with another man.

Searle, appeared for the petitioner.

THE PRESIDENT. I am of opinion that this petition must be dismissed. The agreement has been obtained by the husband without the real concurrence of his wife and without justification. Knowing her frailty it was his duty, when he became her husband, not to have left her to those chances of falling, to which, abandoned as she was by him, she must have been exposed.

It is true that from the birth of the child he allowed her 2s. 6d. a week, but that was not more than the parish authorities could have compelled him to contribute for the maintenance of his child, and when, in order to receive that sum weekly, she came to the hospital in which he was employed, he refused to speak to her. He withdrew from her that protection to which, as his wife, she was entitled, and it was not to be wondered at that she fell with another man. Though the petitioner made the respondent a small allowance up to March last, he deserted her from the time of the birth of the child, and his desertion of her has probably been the cause of the life she is now leading. I therefore reject the application of the petitioner, and dismiss his petition.

Solicitors: *Newman, Stretton, Hilliard, & Willins.*

R. A. P.

PENTY v. PENTY, JOHNSON, AND SABINGIE.

1882

Jan. 24.

Divorce—Petition—Co-respondents.

If a petition alleges adultery with persons unknown the order of the Court must be obtained dispensing with making them co-respondents, notwithstanding that there are already other co-respondents who have been served with process.

THIS was a petition for dissolution of marriage by reason of the alleged adultery of the wife.

The petition alleged divers acts of adultery by the respondent with each of the co-respondents, and in a subsequent paragraph it was stated that the respondent had committed adultery on divers occasions with persons unknown to the petitioner. Directions as to the mode of trial were refused at the registry until the order of the Court had been obtained dispensing with making the persons mentioned in the last paragraph co-respondents.

Middleton, for the petitioner, moved the Court either for directions as to the mode of trial, or for an order dispensing with other co-respondents. It has been the practice not to require further co-respondents as to persons unknown when there is already a co-respondent on the record.

THE PRESIDENT. If adultery is to be relied upon with a person unknown, I do not think it makes any difference that another person has been also charged and served with citation and copy petition. In this case, as the affidavits shew that the petitioner cannot ascertain the names of the other persons, I dispense with further co-respondents.

Solicitors: *Chester, Mayhew, Broome, & Griffiths.*

R. A. P.

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ROSS v. ROSS.

Jan. 31.

Divorce—Variation of Settlements—Petition—Signature—Practice.

A petition for variation of settlements must usually be signed by the petitioner, but the Court will, under special circumstances, allow his solicitor to sign it on his behalf.

THIS was a petition to vary the trusts of a marriage settlement.

The petitioner had obtained a decree nisi for dissolution of his marriage by reason of the respondent's adultery with a person unknown, and that decree was made absolute on the 8th of November, 1881. The solicitors for the petitioner then wrote to him and received instructions to file a petition for variation of the marriage settlement, but it appeared by their affidavit that he was in India, and that if the petition was sent to him for signature there would be considerable delay.

Bayford, for the petitioner, moved the Court either to dispense with the petitioner's signature to the petition, or to allow his solicitor to sign it on his behalf.

THE PRESIDENT. I think the practice of requiring the petitioner's signature is reasonable as shewing that the petition is his act. In this case that is sufficiently shewn by the affidavit, and therefore I will allow the petition to be signed by his solicitor on on his behalf.

Solicitors: *Lawrence, Graham, & Long.*

R. A. P.

[IN THE COURT OF ARCHES.]

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Nov. 15.

PEEK AND OTHERS *v.* TROWER AND OTHERS.

Ecclesiastical Law—Faculty—Judicial Discretion—Opinion of Parishioners—Matters of Taste and Fancy.

Where the incumbent and churchwardens with the approval of the vestry apply for a faculty for alterations in their parish church, and the grant or refusal of the faculty is merely a matter for the discretion of the ordinary, the faculty ought not to be granted unless it is proved to the satisfaction of the ordinary that if the proposed alterations are carried out, the church will be thereby rendered more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate or more adequate to its purposes, or that there exists either on the part of the parishioners generally, or of the parishioners actually attending the church, a general desire in favour of the faculty being granted.

In this case Sir Henry W. Peek the opponent, and Charles S. Hope and others interveners in a cause of faculty promoted by the rector and churchwardens of the united parishes of St. Mary-at-Hill and St. Andrew Hubbard, in the City of London, for the purpose of obtaining a faculty authorizing certain alterations in the interior of their parish church, appealed against a decree of the Consistory Court of London ordering, *inter alia*, the issue of the faculty as prayed.

The judgment delivered by the Chancellor of London (Dr. Tristram) on making the decree appealed from was in the following terms.

April 14, 1881. DR. TRISTRAM. The rector and churchwardens of the united parishes of St. Mary-at-Hill and St Andrew Hubbard, in the city of London, have applied to the Court for a faculty to authorize certain alterations being made in the internal arrangements and fittings of their parish church of St. Mary-at-Hill, which is situate in Love Lane, close to Upper Thames Street, with a view to make it more convenient for the parishioners and others who attend service there and for the choir. The proposed alterations consist in lowering the pews and in refixing the backs of the pews, so as to render them more comfortable for the occupants, in lowering the Communion rails and in making

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some alterations in the floor of the east end of the church, in erecting seats convenient and suitable for the choir, and in removing eight pews from the east end, which are never used and are not required, and in making some other minor alterations. The plans for the proposed alterations have been approved of by the vestry of St. Mary-at-Hill, which is a select and self-elected vestry, and by the vestry of St. Andrew Hubbard which is an open vestry. The estimated cost of the proposed alterations is 480*l.*, which if sanctioned by the Court will be defrayed mainly out of the income of some parish property belonging to St. Mary-at-Hill, which produces an income of 2200*l.* per annum, and partly also out of funds supplied by the vestry of St. Andrew Hubbard, which contributes 50*l.* per annum towards the sustentation and repair fund of their parish church. The Bishop of London has approved of the plans, subject, of course, to any objections that may be raised before or that may occur to this Court. The granting of the faculty is opposed by Sir Henry Peek, who is one of the principal parishioners of St. Mary-at-Hill, and has the alternate patronage of the rectory, and he is supported in his opposition by a large number of ratepayers, from sixty to seventy in number. The grounds of the opposition fall under three heads. First, that the proposed alterations are wholly unnecessary having regard to the comfort or convenience of the parishioners; secondly, that they are not in harmony with the architectural design of the church, which was restored by Sir Christopher Wren, but, thirdly and principally, that the expenditure of 480*l.* on the alterations or of any sum on any alterations of the church is a wasteful expenditure of the parochial funds, owing to the circumstance of the diminution of the population of the united parishes since 1871, and to the possibility of their further diminution and to the consequent possibility or probability of a large portion of the trust funds in question being eventually devoted to the relief of spiritual destitution in the metropolis outside the city of London, as the result of the inquiry of a recent commission—the Royal City Parochial Charities Commission. Since the hearing of the case, I have visited the church, and I have come to the conclusion on the evidence before the Court, which has been confirmed by my own observations on an inspection of the church,

that the first two objections cannot be sustained. The pews, in my opinion, are most uncomfortable, the communion rails are inconveniently high, there are no suitable seats for the choir, and the proposed alterations will be a great and desirable improvement to the church. It only remains for the Court to consider whether the last objection, which I take to be the real ground of the opposition raised to this application, can be sustained. The Court has, no doubt, a discretionary power vested in it to grant or withhold its sanction to alterations open to no legal objection in a church ; but this discretion must be exercised on reasonable grounds and within certain limits. If the alterations proposed are unnecessary or consist in a needless departure from or an infringement on the architectural characteristics of the church, or are opposed on reasonable grounds by a majority or even by a minority of the parishioners, or if there is a probability of their causing offence to parishioners, or if there is a probability of there being a deficiency in the funds required to effect the alterations, or if the appropriation of the fund intended to be expended on the alterations would in equity be a misappropriation of such fund, the Court would very properly refuse a faculty for such alterations. The question for the consideration of the Court on this branch of the case is, whether the application of the funds in question is under the circumstances to be held to be a misapplication of them. The case put forward by Sir Henry Peek on this head is shortly this: Since the year 1871, he says, the resident population of these united parishes have gradually diminished from 616 to about 289, and is likely still further to decrease. There are four churches within a very short distance of this church of St. Mary-at-Hill, any one of which might be conveniently constituted the church of this united parish. The parochial funds were given originally for the spiritual benefit of those whose residence as well as whose daily occupation was in the parish. This class of persons, mercantile clerks and others, have ceased to reside in this parish, and the funds should be transferred to supply the spiritual wants of Hackney and other parishes where they do reside, and where the funds are urgently required. In anticipation that the change he advocates will shortly be made, he contends that there should be no further expenditure on the parish church. The case of the peti-

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tioners on the other hand may thus be stated:—Assuming that there has been a diminution in the population of the parish since 1871, although not to the extent suggested on the other side, there is a congregation of about sixty every Sunday morning and of about seventy every Sunday evening, including the choir. There are also week day services, some of which are well attended. The Tuesday services are attended by from thirty to forty persons, according to the evidence of Mr. Newby, one of the defendants. In the opinion of the vestries of both parishes it is desirable that these alterations should be made, and that this church should be retained as their parish church. The funds for the reparation and improvement of the church are vested in trustees, who in accordance with the terms of the trust deed are to pay and to apply and to dispose of the annual income of this trust estate to and for such uses upon such trusts and for such intents and purposes, and in such manner as the vestrymen of the said parish of St. Mary-at-Hill for the time being or the majority of them in number shall order, direct and appoint. The vestry of the parish of St. Mary-at-Hill have come to the conclusion that it is desirable that this sum of 480*l.* should be expended on these alterations, and the petitioners contend that there is no reason shewn why this Court should reverse the decision of the vestry. There has been no substantial sum spent over the church for thirty years. The sum proposed to be expended is not a large sum, and in the opinion of the vestry of St. Mary-at-Hill and the trustees it is the proper application of the fund at their disposal. Under the circumstances I do not think it any part of the duty of this Court to reverse the decision of the trustees, or that it would be acting within its jurisdiction in doing so. I may add that the internal fittings of the church are of fine old oak, and that there is some very handsome carving in the church by Mr. Rogers, and I should think that even if the church were hereafter to be closed or pulled down in accordance with the scheme of Sir H. Peek, the money proposed to be expended would not be thrown away. The fittings as altered would be very appropriately transferred to another church, whereas in their present condition they could not without the contemplated alterations be adapted to a church elsewhere. I therefore consider it

my duty to grant the faculty prayed. On the question of costs, I have to observe that the Court being satisfied that Sir Henry Peek in raising this opposition to the granting of this faculty has been influenced solely from a sense of public duty, he and those who have been acting with him may be reasonably relieved from being condemned in the petitioners' costs. I, therefore, make no order as to costs against the opponent and intervener. The petitioners will, of course, be entitled to have their costs from the parochial funds as incidental to obtaining this faculty.

Aug. 5. The appeal was heard before the Official Principal of the Arches Court (the Right Hon. Lord Penzance).

Charles, Q.C., Bompas, Q.C., and W. G. F. Phillimore, for the appellants.

Jeune, for the respondents, the rector and churchwardens of the parishes of St. Mary-at-Hill and St. Andrew Hubbard.

The following authorities were cited as to the exercise of the discretion of the ordinary to grant or refuse the faculty: *The Vicar and Churchwardens of Tottenham v. Venn* (1); *Groves and Wright v. The Rector of Hornsey* (2); *The Churchwardens of St. John's, Margate v. The Parishioners, Vicar and Inhabitants of the Same*. (3)

Cur. adv. vult.

Nov. 16. LORD PENZANCE. This is an application for a faculty, which has been opposed by certain of the parishioners of the parishes of St. Mary-at-Hill and St. Andrew Hubbard in the city of London. It comes before this Court by way of appeal from the decision of the Judge of the Consistorial Court of London, who granted the faculty as prayed. The object of the faculty is to authorize certain alterations to be made in the internal arrangements of the parish church of the united parishes of St. Mary-at-Hill and St. Andrew Hubbard, in the City of London. It will be a sufficient description of the proposed alterations for the purposes of the decision which I am about to pronounce if I say that it is intended to cut down or lower the tops of the present pews, to remove their doors, and, by sloping the backs of the seats to make

(1) Law Rep. 4 A. & E. 221.

(2) 1 Hagg. Cons. 188.

(3) 1 Hagg. Cons. 199.

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them more comfortable; to remove some of the pews altogether, and to raise the entire floor of the church towards the end of it at which the Communion table now stands. The church is an old one, built, it is said, by, or after the design of, Sir Christopher Wren, and the pews, which are of handsome old oak, were, in all probability, designed in respect of height and arrangement as part of the entire architectural effect of the church. I have seen the church, and, looking to the position and design of the four stone columns which support the dome and the point at which the tops of the pews meet these columns, I think that a unity of architectural design between them and the pews is manifest. The application for a faculty to authorize these alterations is made by the rector and churchwardens of the parishes in question, and has been approved by the respective vestries of the two parishes. The vestry of St. Mary-at-Hill is a select vestry, the members of which are appointed by the vestry itself; the vestry of St. Andrew Hubbard is chosen in the ordinary way. The select vestry of St. Mary-at-Hill consists of fifteen members, of whom five only attended the meeting at which the alterations were determined upon; but it is not denied that the meeting was duly summoned and full notice given of the proposals which were to be entertained. The estimated cost of the alterations, amounting to nearly 500*l.*, is proposed to be defrayed out of a trust fund, the trustees of which are willing that it should be so applied. It was not denied in argument that they have the legal right and power so to apply it; but if their right to do so had been questioned, this is not the Court that would determine such a controversy, nor has this Court the right to substitute its own discretion for the discretion of the trustees in the use which they propose to make of this trust fund. I must take it for granted, therefore, that if in respect of those matters with which the jurisdiction of this Court is concerned it is fit that the alterations should be made, there are sufficient funds forthcoming without casting any fresh burden on the parishioners to carry them into effect. Upon this state of facts I proceed to consider the duty which devolves upon the Court. The Court, has, it is said, an absolute discretion to grant or refuse its permission, and, as there is no question of the lawfulness of the proposed changes, this, in a general sense, is true. But it will not be

asserted that this discretion is of a capricious or arbitrary nature. It is a judicial discretion to be exercised upon defined and reasonable principles. I have looked into the reports of the decisions of my predecessors in search of some definitions applicable to the present case of the principles which should guide me, but without much success. Two widely different principles present themselves. The Court might say this: If some of the parishioners desire this change, and there is a fund out of which it may be made without placing a burden on others, then, unless those who oppose it can shew that it will work mischief, that it will impair the capacity, the fitness, or the convenience of the church for the purposes of public worship, it ought to receive the sanction of the Court. The objection to such a principle of decision is that it would open the door wide to all capricious changes—would give no heed to those feelings of attachment and regard with which tradition and long time are apt to invest old churches in the eyes of those whose families have sometimes worshipped for generations in the same spot, under the same roof, and with the same surroundings. There are in these matters, as in most others of the kind, two classes of people—those who are prone to believe that all changes must be improvements and those who love the things that be, and who regard all changes, though they may be improvements, with reluctance and the vigilance of a jealous eye. To give unlimited indulgence to the caprices or whims of the one class would be to wound without need the feelings of the other. And then come questions of architectural beauty and the endless controversies of taste, which, though always subordinate to utility, have a fair place in the controversy when utility is not in question. A principle of decision such as I am now discussing would make short work of all these. On the other hand, the Court might say this: All presumption is to be made in favour of things as they stand. If you and others propose to alter them, the burden is cast upon you to shew that you will make things better than they are—that the church will be more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate, or more adequate to its purposes than it was before; and if you cannot shew this to the Court, at least shew the Court that a majority of those for whose worship the

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church exists desires the alterations which you propose. And this is, I think, the language which in substance the Court ought to hold. The burden of proof does, I think, properly devolve upon those who propose a change, and unless that proof is clear and manifest as to the benefits to be obtained by such change, the Court ought to be satisfied that there is a general desire on the part of the parishioners, or at least of the actual worshippers being parishioners, that the change should be made. In the present case all proof of this general desire is not only wanting, but such proof as the Court has before it is in the opposite direction. There are, it is said (after making proper deductions), sixty-six ratepayers in the parish, of whom forty-eight are opposing the grant of this faculty, while the remainder, with the exceptions I am about to mention, say nothing. The two parishes in question are among those City parishes the resident populations of which have for long been steadily declining, owing to the dwelling-houses having given place to warehouses and other business premises. In the ten years between 1871 and 1881 the population has, in round numbers, declined from 616 to 287, and those who live and sleep there now are chiefly the caretakers of these business premises and their families. The consequence is that the congregation (if the officials and a paid choir of nineteen persons are deducted) consists in the main, supposing strangers to be excluded, of these caretakers and their families. It is for them that the pews are to be made more comfortable and some nine inches to be taken off their height. Now, the extraordinary feature of this case is that out of the whole congregation (which does not ordinarily exceed sixty, including the paid choir, although the church could well hold 400) not one single witness has been called to speak of the present pews as being uncomfortable, or of his preference for lower pews with the doors taken off, or of any increased comfort or pleasure which he would expect to derive from the proposed new arrangement. The petitioner's proof consisted of four witnesses only—the rector, the surveyor, and two churchwardens; and, so far as I am able to discover, on the evidence, there is no proof that any one in the parish of St. Mary-at-Hill desires these changes except the rector and churchwardens and the five select vestrymen who voted the money for their execution. Even this

amount of approval is seriously curtailed by the fact that not one of these select vestrymen ever attends the church. On the other hand, it is said that of the forty-eight ratepayers who oppose the faculty all, or nearly all of them, reside out of the parish and never attend the church, and this, I must take it, is the truth; and had a reasonably strong or sufficient case for the faculty been made by the petitioners, the Court would not have been inclined to rate the opposition of these ratepayers above its true value, for they can have little of those feelings in favour of preserving their parish church as it stands to which I have referred. It is worthy of remark that the respondents in the third article of their answer to the petition allege that "no steps have been taken by the rector and churchwardens or the vestry to ascertain the views of the respondents or of the parishioners generally." To this the petitioners have replied that they admit that no steps have been taken to ascertain the views of the respondents, because none of the respondents attend any of the services of, or take any interest in matters connected with worship in, the said church; but they say nothing as to having taken any steps to ascertain the views of the parishioners generally, nor, although thus challenged to the proof of any such attempt on their part, did they give any evidence of their having done so. I must take it, therefore, that these alterations have been planned and devised by a very small number of those interested in the church, and that, without any attempt to ascertain whether they would be acceptable either to the ratepayers or parishioners, or such of them as actually worship in the church, they propose to carry them into execution. To such a proposal I do not think that this Court ought to give its sanction. I am far from desiring to lay down as a rule that the approval of an absolute majority of parishioners must in all cases be obtained before a faculty for alterations of the kind here in question can be granted. There are many matters to be taken into consideration. The character and true motives of the opposition have to be ascertained, if possible, and the opposition taken for what it is worth, and the consideration proper to be accorded to those of whom the opposed classes are constituted has to be weighed and determined. The desire, too, and the opinions of

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the rector are entitled to their due weight. It is he who, in general, from the nature of his office, more than any other individual, takes the most lively interest in all that regards the improvement and embellishment of his church. It is not a little owing to the efforts of our clergy that we owe the great improvements in the beauty of our ecclesiastical edifices which the present generation has witnessed. That aspect of simplicity, degenerating into meanness and monotony, without relief of shadow or colour, which a century and more of indifference and neglect had impressed upon many of our parish churches, has not been replaced by beauty of architecture and decoration without much energy and individual exertion. It would ill become this Court to cast any needless impediment in the way of such exertions in the future. But I see nothing of the kind in the present case. The church as it stands is a very handsome one of its kind, and the alterations proposed can hardly be said to add to its beauty. The question as to whether high pews (and they are not very high) with doors to them, or pews some nine or eleven inches lower without doors to them, constitute the preferable way of arranging the sittings in a church, when there is abundance, and more than abundance, of room for everybody, is one about which people will differ largely. In bygone years the prevailing feeling was much in favour of these high pews with doors to them; the prevailing feeling in the present day is, I believe, in an opposite direction; in a day to come it may revert to what it was. It is precisely one of those matters upon which the general opinion of the parishioners ought to have the greatest possible weight with the Court. For what right, it may be asked, can a very small section of the parishioners have to impose their will or whim on others, who have the same interest precisely in the church which they themselves have, and who are much more numerous than they are? Similar remarks apply to all the other proposals. They add nothing to the accommodation of the church in the way of room, an accommodation which is not wanted, indeed, if they did. They are all matters of taste and fancy, and, in the absence of a clearly expressed opinion in their favour by a sufficient body of the parishioners, the Court ought not to sanction such an

interference with the existing arrangements of this old church. The order of the Court below must be reversed, and the faculty refused.

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Appeal allowed.

Solicitor for appellants: *T. D. Francis.*

Solicitors for respondents: *Horne, Hunter, & Birkett.*

G. B.

[IN THE COURT OF ARCHES.]

Nov. 16.

PERKINS v. ENRAGHT.

Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8—Locus standi of Complainant—Representation made by Churchwarden ceasing to be Churchwarden after Date of Representation—Refusal of Intervention or Substitution of New Parties—Practice.

The complainant in the matter of a representation under the Public Worship Regulation Act, 1874, in which the incumbent of a parish church was the party complained of, was at the time of the making of the representation one of the churchwardens of the parish, and continued in his office as churchwarden until after an inhibition had issued in the suit inhibiting the incumbent from performing divine service within the diocese. Subsequently to the issue of this inhibition another person was elected as churchwarden in the place of the complainant, and the complainant ceased to reside in the parish. Afterwards the newly appointed churchwarden applied to the Court by motion for leave to intervene in the suit or to be substituted as party therein in place of the complainant.

The Court refused the motion.

affirmed on appeal 7 PD 141 PC.
On the 10th of April, 1879, a representation under the Public Worship Regulation Act, 1874, was made to the Bishop of Worcester complaining of the Rev. R. W. Enraght, incumbent of the parish church of Holy Trinity, Bordesley, in the diocese of Worcester, in respect of certain alleged unlawful practices in the conduct of divine service. The representation was made by John Perkins, one of the then churchwardens of the parish of Holy Trinity, Bordesley, and having been sent to this Court under the provisions of the Public Worship Act, 1874, this Court proceeded to hear and determine the matter of the representation, and having pronounced that the respondent had been guilty of offences against the ecclesiastical laws in respect of certain of the matters complained of, on the 28th of August, 1879, admonished him to refrain from such matters or practices for the future, and on

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the 9th of March, 1880, issued an inhibition in the suit, inhibiting him for the term of three months from the time of the publication of the inhibition and thereafter until the same had been relaxed from performing divine service or otherwise exercising the cure of souls within the diocese of Worcester. (1) From the time of making the representations up to the issue of the above-mentioned inhibition John Perkins had continued to be one of the churchwardens of the parish of Holy Trinity, Bordesley; but on the 29th of March, 1880, at a vestry meeting held for the election of churchwardens for the then ensuing year his re-election was opposed, and Thomas Harris and George L. Clay were elected churchwardens of the parish, and were on the 11th of May, 1880, duly sworn and admitted by the Chancellor of the diocese of Worcester.

On or about the 28th of February, 1881, John Perkins ceased to reside in the parish of Holy Trinity, Bordesley, and on the 18th day of April, 1881, Thomas Harris and George L. Clay were re-elected churchwardens, and were subsequently sworn in and admitted by the archdeacon of Worcester on the 11th of May, 1881.

Nov. 16. *Theodore Dodd*, on behalf of Thomas Harris and George L. Clay, moved the official principal of this Court (the Right Honourable Lord Penzance) for an order that the names of Thomas Harris and George L. Clay, the churchwardens of the church of Holy Trinity, Bordesley, or the name of the said George L. Clay alone might be substituted in the suit or matter of representation entitled *Perkins v. Enraght* for the name of the said John Perkins, or that the future conduct of the said suit or matter of representation be given to the said Thomas Harris and George L. Clay, or to the said George L. Clay alone, or that the said Thomas Harris and George L. Clay might appear and intervene in the same suit or matter, or for such other order as the Court shall think fit, on the ground that the said John Perkins was not then and had not since the 29th day of March, 1880, been a churchwarden of the said church of Holy Trinity, Bordesley, and on the ground that the said John Perkins was not then and had

(1) See *Enraght's Case*, 6 Q. B. D. 422.

not since the 28th day of February, 1881, been a parishioner of the said parish of Holy Trinity, Bordesley.

Jeune, for the complainant, opposed the motion.

The respondent had been served with notice of the motion, but did not appear in person or by counsel.

Affidavits were brought in in support of the motion, but were not used in Court as the facts therein alleged were admitted on behalf of the complainant. The substance of the facts so admitted have been stated above.

The arguments of counsel can be gathered from the judgment.

The following authorities were cited in support of the motion:—

Liddell v. Beal (1); *Lee v. Fagg* (2); *Prideaux on Churchwardens*, p. 47; *Emden v. Carter* (3); *White v. Bowron* (4); *Elphinstone v. Purchas* (5); *Tristram*, *Contentious Probate Practice*, p. 115; *Clement v. Rhodes* (6); *Dalrymple v. Dalrymple* (7); *Oughton*, *Ordo Judiciorum*, tit. xiv., p. 28; *Law, Forms of Ecclesiastical Law*, p. 70.

LORD PENZANCE. I am of opinion that this Court has no power to do what it is asked to do in either of the forms in which the application has been made. What may be the effect on the existing suit of *Mr. Perkins*, the person who made the representation in this suit, having ceased to be a churchwarden, and having ceased to reside in the parish, is a matter that I do not inquire into to-day, but I feel unable to grant the application that is made to-day on the ground in the main which I pointed out very early in the argument of counsel. The application is to substitute the names of the present churchwardens for the name of *Mr. Perkins*. This suit is a suit under the Public Worship Regulation Act, in which Act for the first time I think the legislature undertook to frame throughout the whole of its steps the proceedings in a suit, and they have framed these proceedings with great care and with great particularity. There are certain things to be done within a certain space of time by several officers, one after the other, which unfortunately has led to a great deal of

(1) 14 Moo. P. C. 1.

(2) Law Rep. 6 P. C. 38.

(3) 17 Ch. D. 173, 768.

(4) Law Rep. 4 A. & E. 207.

(5) Law Rep. 3 A. & E. 66.

(6) 3 Addams, 40.

(7) 2 Hagg. Cas. 137.

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trouble in the working, because these officers are not accustomed to do these duties, and there have been more than one instance in which they have failed to observe the precise time and forms stipulated by the Act. But the legislature has been very careful to regulate the whole of this procedure from beginning to end, and in that Act, and in the regulations made under it, there is not a word said as to whether anything, and if so, what is to be done in case the individual who takes the first step in the suit, and who then was a churchwarden, ceases to be a churchwarden.

Now, I should like to point out, in the first instance, with reference to this question, that the Public Worship Regulation Act does not say that the churchwardens, that is, the corporation of which the learned counsel spoke, should make a representation, but the 8th section provides that, "If the archdeacon or a churchwarden of the parish shall be of opinion that the incumbent has within the preceding twelve months, used or permitted to be used in such church any unlawful ornament of the minister . . . such archdeacon or churchwarden may, if he or they think fit, represent the same to the Bishop." No doubt, therefore, the statute requires a representation to be made by a person who at the time he makes the representation fills the character of a churchwarden of the parish, but it does not require a representation from the churchwardens as such representing in their corporate capacity the interest and the property of the parishioners. Well then, it is provided that a churchwarden may make a representation. Mr. Perkins was a churchwarden when he made the representation, and, of course, he made the representation in reference to acts that had been done while he was churchwarden, and before he made his representation; and the suit having been commenced I am not at all sure that the legislature intended that his ceasing to be a churchwarden should make any difference whatever. I do not know why it should. Of course I quite understand what the learned counsel pressed upon me. It may be that another churchwarden who takes the place of Mr. Perkins may view the matter in a totally different light; and had he been in Mr. Perkins's place he would never have made any representation at all, and it may be that the churchwarden succeeding Mr. Perkins is very unwilling that any further steps

should be taken in the suit. But I am not sure that the legislature meant that if that state of things came about the suit should come to an end, or that the former churchwarden's name should be struck out of the suit, and that of the succeeding churchwarden put in. The learned counsel, who has spoken in support of the motion, in his argument, I think, fell into what appears to be a fallacy with reference to substitution and intervention. In all cases where the Court has allowed one man to be substituted for another, it is where the man who is substituted has succeeded to an interest or property of one kind or another, which property no longer belongs to or is controlled by the man going out. Where the suit relates to property in that way, it is rational and natural that all Courts should have before them, not only at the commencement of the suit, but in every step of the suit up to the last moment, the person who represents the property. That is the history of all interventions in the Probate Court and in the Court of Chancery; and I may say, in every case, where intervention arises, it arises because the man who intervenes comes and says that he is interested, and that he ought to be heard, and on the commonest principles of justice he is allowed to be heard. I particularly note that in the passage cited from a book of high authority in this Court (Oughton's *Ordo Judiciorum*) where it is laid down that a party may intervene in his own defence, the words used are the following: "He may interpose in defence of his own interest in every cause which has reference to his property or his person" (Oughton's *Ordo Judiciorum*, tit. xiv. 1.) In a roundabout sort of way it was contended that this gentleman who asks to be interposed here has an interest. I fail to see what interest he has which he comes here to defend. This suit will not touch him whatever comes of it. Whatever happens in the suit he will at its conclusion be precisely the same in his person and property as he was the day before the suit commenced. Therefore I fail to see that he comes here to interfere in defence of any interest. He may come here to represent his own opinion, but that is a very different thing to intervening in his own defence. That being the state of things, as I was saying I am not in the first place satisfied that the legislature, had their intention been called to the matter, would have made any provision to

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strike out the original representator and to put in somebody else ; but even if they had been disposed to do so, if their attention had been called to it, they have not done so. If they have not done it, how am I to do it? because my power, sitting here in a suit under the Public Worship Regulation Act, is confined to the power given me in that statute. Then the learned counsel, in support of the motion, argued, and he is quite right to put it forward in argument: "It is true that there is no power in the statute, but the statute says that the practice and proceedings taken before the judge under the statute shall be regulated by rules and orders which are to be made for regulating the procedure." Well, in accordance with this provision, the rules and orders that I hold in my hand have been made and have created a regular procedure, and amongst them there is no rule whatever specifically relating to this subject, but there is the 82nd Rule, which is as follows: "In any particular not provided for by these rules, the general practice of the Arches Court shall be followed as far as the same is applicable." I think that to do what I have been asked would be a very considerable step to take in a suit under so general a rule as that which I have just read, but even supposing the step I have been asked to take was within the rule to which I have just referred, it becomes necessary to see that the general practice of the Arches Court would warrant such a step, and I do not find anything put before me to shew that there was any such practice in the Arches Court. For instance, suppose the suit had been commenced in the Arches Court in the ordinary way, and that the title of the cause was, "The office of the judge promoted by A. B. against C. D." A. B. need not have been even a parishioner. At the time the Public Worship Regulation Act passed it was said that the proceedings taken under it against the clergy might be taken at the will of so small a number as three parishioners, and this has been made matter of complaint, but in reality before the Act passed proceedings might be taken against the clergy not by three but by one person, and that one need not be a parishioner. That has been decided over and over again, and is perfectly clear law. Therefore, let me imagine a case before the Public Worship Regulation Act. We are dealing now with the general practice of the Arches Court.

Let me imagine that a suit has been commenced by A. B., as a promoter of the office of the judge, against C. D. Is there any practice of the Arches Court that would warrant the proposition that because A. B., who at the time he promoted the suit was a person living in the parish, and much interested in the proceedings of the clergyman, had since the institution of the suit retired to the other end of the kingdom and had ceased to have any interest in the affairs of the parish, therefore, somebody else should be put in his place. I am not aware of any such practice, and no case at all has been cited to shew that that course would have been taken. In fine then, it seems to me that the application fails for want of the power in the Court according to anything that has hitherto been determined or anything that has been conferred upon it to do the thing that is asked. But suppose that I had any such power I can see considerations which point both ways. Therefore, I must refuse this application, which has been very ably argued before me with a reference to every authority which could bear on the subject. It is not, therefore, for want of the matter being perfectly argued and brought before the Court that I fail, if I have failed, to rightly interpret the view of the legislature in this matter. The application must be refused with costs.

Application refused.

Solicitors for applicant : *Robinson, Preston, & Co.*

Solicitors for complainant: *Tebbs & Co.*

G. B.

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THE MAC (1881 Fo. No. 406.)

Feb. 1.

Salvage—Appeal from Justices—Jurisdiction—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 2, 458, 460—Meaning of “Ship or Boat stranded or in Distress on the Shore of any Tidal Water.”

Justices awarded salvage in respect of services rendered to a hopper barge, which had been found adrift without any person on board of her, in the Wash, about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes. There was no evidence that she was employed in navigation:—

Held, that the barge was not a ship or boat within the meaning of the Merchant Shipping Act, 1854, s. 458, and that the justices had acted without jurisdiction.

The Leda (Swa. 40) followed.

And an appeal put 12th Ch.

THIS was an appeal from an award of salvage made by justices.

The award was in substance as follows:—

Whereas, on the 20th of October, 1881, application was made to William Thompson, Esq., one of Her Majesty's justices of the peace in and for the borough of King's Lynn, by Henry Petts, of the said borough, fisherman, that on the 15th of October then instant, a certain ship, boat, or barge, being a hopper barge, called the *Mac*, belonging to James Nicholl McAdam, was in distress, a wreck derelict, drifting on the sea, in a place called or known as the Wash, between the counties of Norfolk and Lincoln; that the said Henry Petts and other fishermen, being the crew of a smack called the *Saucy Polly*, of the port of Great Yarmouth, then and there rendered certain services in respect of the said ship, boat, or barge called the *Mac*, that is to say, in assisting the said ship, boat, or barge, by picking up, rescuing, and conveying the same to a place of safety, namely, the port of King's Lynn, for which he, the said Henry Petts on behalf of himself, the owner and rest of the crew, of the said smack, claimed a certain amount of salvage not exceeding the sum of 1000*l.*, but that a dispute had arisen between the said James Nicholl McAdam and the said Henry Petts, as to the amount of such salvage, and that the parties aforesaid could not agree as to the settlement thereof by arbitration or otherwise, and the said Henry Petts therefore applied to the said justice to summon the said James Nicholl McAdam, the owner aforesaid, before two justices of the peace in order to deter-

mine the dispute aforesaid. And whereas the said Henry Petts, together with William Nelson Smith, the agent and manager of the said James Nicholl McAdam, are now present before us for the purpose of having the claims and demands of the said Henry Petts and the owner and rest of the crew of the said fishing smack, the *Saucy Polly*, for such services as aforesaid, heard and adjudicated upon pursuant to the Merchant Shipping Act, 1854. We, therefore, the said justices having examined into the cause and circumstances of the premises upon oath and all matters relating thereto, do hereby order and award that the said James Nicholl McAdam shall, upon notice of this our award and order, pay unto him, the said Henry Petts, the sum of 50*l.* for services of every description as aforesaid, rendered by himself and others of the crew of the said fishing smack, together with the sum of 4*l.* 13*s.* 10*d.* costs, and the court fees incurred before us in hearing and adjudicating upon the said claim.

A certified copy of the proceedings before the justices was brought into the registry, and therefrom it appeared that evidence to the following effect had been given before them on behalf of the salvors and the defendant, the owner of the *Mac*, respectively.

On behalf of the salvors the two principal witnesses were the owner and the master of the *Saucy Polly*, and an engineer who had examined the *Mac*. The evidence of the first of these witnesses was, so far as material, as follows: He saw the *Saucy Polly* on Saturday, the 15th instant, coming up the Estuary Cut with a barge in tow. The barge had a bow, stern, and rudder, and was "steerable." The barge was being towed; no masts or sails up. There was a pole which could be used as a mast on which a sail could be fixed, a small one; it could also be used to hoist a light upon.

The master of the *Saucy Polly* stated in his evidence that as the *Saucy Polly* was riding at anchor in the Wash during a gale on the 15th of October, from two to three miles from Boston shore, he, on looking out to sea, saw the *Mac* drifting to the eastward; that he then boarded her and anchored her for the night, and the next morning towed her to Lynn Harbour; that he could not have got her along except by towing; that she would not steer alone, but that the rudder would act if she was propelled by

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steam, and that vessels similar to her were always moved about by steam-tugs.

The engineer deposed that at the request of the salvors he had examined the hopper barge; her length was seventy-three feet, her width nineteen feet; she was constructed of iron plates three-sixteenths of an inch thick, riveted throughout, air-tight compartments at side, cabin at each end, hopper fitted with lifting doors and apparatus complete. She would drive by tide and wind, and was used for dredging purposes.

On behalf of the defendant evidence was produced before the justices to the effect that the *Mac* was not navigable, was not fitted with masts or sails, and had no propelling power; that she was bought in Holland and had been towed across; that she was made to go ashore on a sand, and that she had, when empty, four-and-a-half feet freeboard, and had then only a draught of nine inches.

W. G. F. Phillimore, for the appellant, the owner of the *Mac*. The only jurisdiction justices possess in salvage disputes is in respect of the cases mentioned in the 458th section of the Merchant Shipping Acts, 1854. The jurisdiction is restricted to cases where wreck is saved, or where any ship or boat, or the cargo or apparel of any ship or boat, is stranded, or otherwise in distress on the shore of the sea or any tidal water within the limits of the United Kingdom. *The Zeta* (1) is an authority to shew that this barge was not a wreck. This barge is not a ship or boat within the meaning of the Merchant Shipping Act, 1854 (interpretation clause, s. 2). *Ex parte Ferguson* (2) does not apply to this case, because the barge was not employed in navigation, and was used for dredging purposes only: *The C. S. Butler*. (3) Even if the barge is to be regarded as a ship or boat she was not stranded or in distress on the shore of any sea or tidal water. *The Leda* (4), it is submitted, ought to be reconsidered.

[SIR ROBERT PHILLIMORE. I shall certainly follow *The Leda*. (4)]

Bucknill, for the respondents, stated that he did not propose to argue that the *Mac* was "wreck." The *Mac* was a vessel used

(1) Law Rep. 4 A. & E. 460.

(3) Law Rep. 4 A. & E. 238.

(2) Law Rep. 6 Q. B. 280.

(4) Swa. 40.

in navigation not propelled by oars. The employment of a vessel in navigation cannot depend upon whether she has means of propulsion within herself. The place where the salvors found the *Mac* was out at sea, at least three miles from the coast, and it is obvious that she was built to stand the sea, and that, like the steam dredgers employed in rivers, she would habitually go out to sea to deposit the mud dredged up by her. She therefore was in fact a "ship or boat," even on the assumption that no vessel can be a ship or boat unless she goes to sea. But the meaning of "ship" is not in any way restricted by the inclusive definition given in the Merchant Shipping Act, 1854, and is not confined to a vessel used in navigation not propelled by oars. Moreover, there is nothing either in the 2nd or the 458th section of the Merchant Shipping Act, 1854, to confine "navigation" to "navigation on the seas." In fact the phrase "used in navigation" is really nothing more than an expression equivalent to "used on the water."

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Phillimore, in reply.

SIR ROBERT PHILLIMORE. The hopper barge to which the salvage services were rendered in this case was a vessel not propelled by oars; but the question remains whether I have any evidence before me that she was a vessel used in navigation. Now I do not see my way to hold that there is in this case any evidence that she was employed in navigation, using the word navigation in the sense in which it is made use of in the interpretation clause of the Merchant Shipping Act, 1854. She has therefore, in my opinion, not been shewn to be a ship or boat within the 458th section of the Merchant Shipping Act, 1854, and accordingly, it being admitted that she was not "wreck," I must decide that the magistrates had no jurisdiction to make any award of salvage in this case. The appeal must be allowed, and the judgment appealed against reversed. It must be understood that I make this decision on the precise ground that I have no evidence before me that this hopper barge was used in navigation.

Solicitors for appellant: *Tompson & Co.*

Solicitors for respondents: *Whyte, Collison, & Pritchard.*

G. B.

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Nov. 23.

THE VANDYCK. (1881 S. 234.)

Salvage—Constructive Acceptance of Salvage Service—Service rendered to Two Vessels in Collision with each other.

Where two vessels are in collision and are entangled together in a position dangerous to both, salvors who, by towing one of the vessels clear, free both vessels from danger, are entitled to recover salvage reward from the owners of both vessels.

A screw steamship drifted, during a gale of wind, across the bows of a ship at anchor in the Mersey, and with her propeller caught the anchor chains of the ship, and the two vessels were held together in a position dangerous to both. A steam-tug went to the assistance of the ship, and held her whilst her chains were slipped and towed her clear of the steamship:—

Held, that the owners, master, and crew of the tug were entitled to recover salvage reward from the owners of the steamship.

THIS was an action of salvage instituted on behalf of the owners, master, and crew of the steamtug *Stormcock*, against the steamship *Vandyck* and her cargo.

The statement of claim alleged in substance as follows:—

1. The *Stormcock* is a twin screw steam-tug belonging to the port of Liverpool, of the burthen of about 465 tons.

2. The *Vandyck* is a screw steamship of the burthen of about 1098 tons registered tonnage.

3. On the 14th day of October, 1881, at about 4.15 P.M., the *Stormcock* was at the Liverpool landing stage, in the river Mersey. There was a tremendous hurricane blowing at the time, with a very heavy sea running. The tide was then about three-quarters of an hour ebb.

4. Those on board the *Stormcock* saw the *Vandyck* on the Cheshire side of the Mersey, opposite the Alfred Dock, in collision with a large ship, which proved to be the *Queen of Scots*, and the *Stormcock* at once went to the assistance of both the said vessels.

5. The *Stormcock* on reaching the said vessels found that the *Vandyck* had drifted right across the bows of the *Queen of Scots*, striking her with her starboard quarter, and carrying away the jibboom and other head gear of the *Queen of Scots*. The two vessels were grinding against each other heavily, and a large hole

had been knocked in the after part of the starboard side of the *Vandyck*. The *Queen of Scots* had both her anchors down, and the propeller of the *Vandyck* had got between the anchor chains of the *Queen of Scots*, thus rendering it impossible for the *Vandyck* to use her propeller to get away from the *Queen of Scots*. A vessel called the *Duchess of Argyle* was lying about two cables' length astern of the *Vandyck*.

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6. The *Vandyck* and those on board her were then in a position of great danger from the said collision, and in order to free the said vessels from one another it was necessary that the *Queen of Scots* should be towed ahead and that her anchor chains should be slipped.

7. It was also necessary that the *Queen of Scots* should be towed away before her chains were slipped in order that the *Vandyck* when set free might be better enabled to clear the *Duchess of Argyle*.

8. The *Stormcock* then gave the *Queen of Scots* a hawser, which was made fast, and the *Stormcock* went on ahead until the *Queen of Scots* was enabled to slip her anchor chains, and the two vessels were thus set free from one another.

9. But for the services rendered by the *Stormcock*, as aforesaid, the *Vandyck* would in all probability have sustained considerable further damage, and have sunk, together with her cargo.

10. In the performance of the said services the *Stormcock* was in considerable danger, and ran great risk.

The defendants the owners of the *Vandyck*, and the owners of her cargo, on the 15th of November last, delivered a statement of defence, admitting the 1st and 2nd paragraphs of the statement of claim, and containing, inter alia, the following allegations:—

A little after 4 P.M. on the 14th day of October, 1881, whilst the wind was blowing a gale from the N.W., and the tide was first quarter ebb, the steamship *Vandyck* and the ship *Queen of Scots*, both of which were at anchor in the river Mersey, fouled one another, the port bow of the *Queen of Scots* coming in contact with the starboard quarter of the *Vandyck*. The *Vandyck* was riding to her starboard anchor, and had her steam up; the *Queen of Scots* had her port and starboard anchors down. The *Queen of*

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Scots struck the starboard quarter of the *Vandyck* with her port bow, and the *Vandyck* fell away to the westward across the bows of the *Queen of Scots*, and the propeller of the *Vandyck* was fouled by the starboard anchor chain of the *Queen of Scots*, and in consequence thereof, the *Vandyck* was unable to use her propeller and the vessels fell alongside each other, the bows of the *Queen of Scots* to the stern of the *Vandyck*. The *Vandyck* had two tugs, the *Merry Andrew* and the *Victory*, in attendance upon her, and they made fast to a line carried from the port quarter of the *Vandyck*, and held the *Vandyck*; and the *Queen of Scots* then slipped her starboard chain, and the *Vandyck* at once came clear. The *Vandyck* then cast off the tow-rope, and her head fell round to the tide. The chain of the *Vandyck* parted with the strain upon it, and the *Vandyck* then steamed ahead across the river, and afterwards proceeded without assistance to the south of the Woodside landing-stage.

The defendants admit that the *Queen of Scots* cut into the after part of the starboard side of the main deck of the *Vandyck*, but they say that the *Vandyck* was not damaged below the water line, and that she made no water, and that as soon as the propeller was clear of the starboard chain of the *Queen of Scots*, there was nothing to prevent the engines of the *Vandyck* being used.

The defendants deny that the *Stormcock* went to the assistance of the *Vandyck* or rendered assistance to her. The defendants deny that the *Vandyck* was in a position of great danger as alleged; the two tugs before-mentioned were sufficient to render, and they did render, to the *Vandyck* all necessary assistance.

The defendants deny the 7th paragraph of the statement of claim, and they deny that the *Stormcock* had begun to tow the *Queen of Scots* before her starboard chain was slipped.

The defendants admit that the *Stormcock* gave the *Queen of Scots* a hawser, which was made fast as alleged in the 8th paragraph of the statement of claim, but they do not admit the residue of the said paragraph, and they say that any services rendered by the *Stormcock* were rendered to the *Queen of Scots*, and not to the *Vandyck*.

As to the 9th and 10th paragraphs of the statement of claim, the defendants deny, that but for the services rendered by the

Stormcock, the *Vandyck* would have sustained further damages, and they do not admit that in the performance of the alleged services the *Stormcock* was in danger, or ran great risk.

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Nov. 23. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

Witnesses were examined orally in Court on behalf of the plaintiffs and the defendants. Amongst the witnesses so examined was the pilot in charge of the *Queen of Scots* at the time of the collision. He stated, in effect, that the *Stormcock* came up to the *Queen of Scots* about five minutes after the collision, that at that time the starboard-quarter of the *Vandyck* was lying across the bows of the *Queen of Scots*, and that every time the vessels fell together with the heaving of the sea the *Queen of Scots* cut into the *Vandyck* nearer the water every time. He further stated, in cross-examination, that if the *Queen of Scots* had slipped her chains before she had been held up in position, she would have fouled the *Duchess of Argyle*. It appeared from the evidence of other witnesses called on behalf of the plaintiffs, that if the *Vandyck* had remained where she was, the *Vandyck*, and possibly the *Queen of Scots* also, would have sunk.

The witnesses for the defendants proved that when the *Stormcock* was holding up the *Queen of Scots* the steamtug *Merry Andrew* was fast to the port quarter of the *Vandyck*, and the steam-tug *Victory* was fast ahead of the *Merry Andrew*.

The total value of the property proceeded against was admitted to be 83,500*l*. The result of the remainder of the evidence is stated in the judgment.

An action was brought by the owners of the *Stormcock* and the owners of two other tugs against the *Queen of Scots* to recover salvage for the services rendered on the same occasion to the *Queen of Scots*. That action was heard immediately before the present action, and the judge in that action awarded 400*l*. to the *Stormcock*. It was agreed by the parties to the present action that the evidence in that action should be taken as given in the present action.

Myburgh, and *J. Walton*, for the plaintiffs. The assistance of the *Stormcock* was directly instrumental in saving the *Vandyck*

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from sinking, and it is immaterial that such assistance was rendered after an express request from the *Queen of Scots: The Annapolis* and *The Golden Light* (1); *The Woburn Abbey*. (2) The services rendered to the *Vandyck* were services such as no prudent man would have refused to accept.

Butt, Q.C., and *G. Bruce*, for the defendants. The services in this case were services rendered at the express request and directly for the benefit of the *Queen of Scots*. There was nothing to prevent the *Queen of Scots* slipping her anchors except the danger of her drifting down upon the *Duchess of Argyle*, and that was a contingency which in no way concerned the *Vandyck*. All the assistance the *Vandyck* required could have been rendered by the *Merry Andrew* and the *Victory*, the two steam-tugs which were in attendance on her at her request.

SIR ROBERT PHILLIMORE. In this case the steamtug *Stormcock* brings her action of salvage against the steamship *Vandyck*, which at the time the services were rendered was in collision with the ship *Queen of Scots*. Now the first question the Court has to decide is, was there any salvage service in its legal sense rendered by the plaintiffs to the *Vandyck*, inasmuch as there was no request made to the *Stormcock* to act on behalf of the *Vandyck*, and several cases were cited to the Court to shew that the owners of the *Vandyck* were under no liability to pay salvage remuneration. But I am of opinion that in the circumstances of this case the evidence shews that the services of the *Stormcock* were accepted by the *Vandyck*. The next question is, what was the value of the services so rendered to the *Vandyck*, and looking to the evidence, and after conferring with the Elder Brethren of the Trinity House, I am of opinion that a valuable salvage service was rendered to the *Vandyck*, though it was one of very short duration, lasting only twenty minutes, and though it is possible the *Vandyck* might have received great assistance from other tugs that were there. But looking to the evidence, especially to that of the pilot of the *Queen of Scots*, who described the injury which the *Vandyck* had sustained from the *Queen of Scots*, and to all the circumstances of the case, I am of opinion

(1) Lush. 355.

(2) 3 Mar, Law Cas. 310.

that a very valuable salvage service was rendered to the *Vandyck*, and I shall award 300*l*.

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Solicitor for plaintiffs: *H. Thompson*.

Solicitors for defendants: *Thornely & Dismore*.

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 THE KENMURE CASTLE.

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(1882 J. No. 5. 1882 P. No. 52. 1882 Q. No. 11.)

Feb. 17.

Salvage—Award—Apportionment.

In a suit instituted to recover salvage reward in respect of services rendered in towing a disabled vessel into safety, the Court awarded a total sum of 4000*l*, of which 3000*l*. was apportioned to the owners.

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THIS was an action of salvage brought by the owners, master and crew of the Belgian steamship *John David*, against the British steamship *Kenmure Castle*, her cargo and freight.

The following facts appeared from the pleadings and evidence:—

In the early morning of the 15th of November, 1881, the *John David* proceeding up the Red Sea bound to London, came up with the *Kenmure Castle* which had broken her crank shaft, and was in other respects damaged in her machinery. After negotiations between the masters of the two vessels, a memorandum in writing was drawn up and signed by the two masters. It stated that the master of the *Kenmure Castle* had requested that the *Kenmure Castle* should be towed to Suez to effect repairs, and that it was agreed that the remuneration for the services rendered should be settled by arbitration in London, and that any coals required by the *John David* should be supplied by the *Kenmure Castle* at the current rate at Suez. The *John David* was then lashed along side the *Kenmure Castle* for the greater convenience of coaling, and was towed in this position for some hours when the *John David* cast off, and towed ahead of the *Kenmure Castle*. The *John David* continued towing ahead until the morning of the 19th of November, when the two vessels were again made fast alongside each other, and about fifty tons of coal were worked from the *Kenmure Castle* on to the *John David*; when this had

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been completed, the towing hawsers were again made fast, and the *John David* continued towing ahead until the evening of the 25th of November, when the vessels arrived in Suez Roads and came to anchor. Whilst the *Kenmure Castle* was fastened alongside the *John David*, some damage was done to the *Kenmure Castle* in consequence of the vessels bumping against each other.

The value of the *John David* was admitted to be 75,000*l.*, and for the purpose of the action the value of the *Kenmure Castle*, her cargo and freight was taken at the total value of 75,140*l.*

Feb. 17. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

Butt, Q.C., and *W. G. F. Phillimore*, for the owners and master of the *John David*.

Nelson, for part of the crew of the *John David*.

Morice, for the remainder of the crew of the *John David*.

Myburgh, Q.C., and *Baden Powell*, for the defendants, the owners of the *Kenmure Castle* and the owners of her cargo.

SIR ROBERT PHILLIMORE. This is a salvage service rendered by one large screw steamer to another in the Red Sea, beginning on the 15th of November and lasting till the 25th of that month. The vessel to which the services were rendered was the *Kenmure Castle*, a screw steamer of 1268 tons register, and 180 horse power nominal, and she was on a voyage from China to London with a cargo of tea, and was manned with a crew of twenty-seven hands. On the 14th of November, as she was prosecuting her voyage up the Red Sea, when twenty miles N.W. of the Island of Jebel Zuker, it was found that her crank shaft was broken. She was from that moment a log upon the water, perfectly unable to do anything for herself, and requiring steam power assistance. The vessel that rendered the salvage services in this case was the *John David*, belonging to the port of Antwerp. She was a screw steamship of 1807 tons gross register, and was prosecuting a voyage from Bombay to London with a full cargo of cotton and wheat. It is a curious incident that the *John David* and the *Kenmure Castle* with her cargo were of nearly equal value. Now, the towage in this case was an easy one in

one sense. The weather was fine, and the vessels met with no accident in the whole course of the towage, but at the same time the Court takes into consideration what would have happened if bad weather had set in. The salved vessel was in a state in which salvage assistance was necessary. If the weather had become rough, she might have drifted on the coral reefs, of which there are so many in the Red Sea. It must be remembered that the salving vessel was bound in the same direction as the vessel salved, and that there was no danger to the salvors personally. Bearing all these matters in mind, I have come to the conclusion, after consulting with the Elder Brethren, that the salvage remuneration awarded in this case should be 4000*l.*, and I apportion it as follows: 3000*l.* to the owners of the *John David*, 400*l.* to her master, and 600*l.* to her crew. With regard to the services of the owners of the *John David*, I may say that the efficiency of the steam power of their vessel was a main ingredient in the salvage service. I award one set of costs only.

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Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Cooper & Co.*

G. B.

THE R. L. ALSTON. (1881 L. No. 3208. Fo. 407).

Feb. 8.

Damage—Construction of Tees Conservancy Regulations—"Maximum speed of Six Miles per Hour."

The 22nd clause of the bye-laws of the river Tees, which provides that no steamship shall be navigated on any part of the river Tees at a higher rate of speed than six miles per hour, is to be construed as prohibiting a steamship proceeding against the tide being navigated at a greater speed than six miles per hour through the water.

THIS was an action of damage instituted on behalf of the owners of the steamship *Lady Mostyn* and the owners of her cargo against the steamship *R. L. Alston*, to recover for the damage arising out of a collision between the two vessels in the river Tees on the 6th of November last.

The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.



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Witnesses were examined on behalf of the plaintiffs.

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It appeared from admissions in the pleadings, and from the evidence of these witnesses, that the *Lady Mostyn* was, on the 6th of November, proceeding down the river Tees on her way to sea, and making about five knots over the ground; that the tide was then about the last quarter flood, and of about the force of three knots; that at such time she came into collision with the *R. L. Alston*, which was coming up the river.

It was admitted that bye-laws for regulating the navigation of the river Tees were in force at the time of the collision, and that the 22nd and 23rd clauses of such bye-laws were in the following terms:—

Clause 22. No steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of six miles per hour.

Clause 23. Whenever there is a fog no steamship shall be navigated in any part of the river at a higher rate of speed than three miles per hour.

After the plaintiffs' case had been closed it was agreed between counsel, with the consent of the Court, that the question whether, on the facts then before the Court, the *Lady Mostyn* was to blame for the collision should be argued before any evidence had been called on behalf of the defendants.

Butt, Q.C., and *Myburgh, Q.C.* If the *Lady Mostyn* was to blame it can only be on the ground that she was proceeding down the river at a greater speed than is permitted under the 22nd clause of the bye-laws. The maximum rate of six miles per hour mentioned in that clause must refer to the speed of a vessel over the ground. The *Lady Mostyn* was only going at a rate of five miles over the ground, and she therefore in nowise infringed the clause in question.

Webster, Q.C., and *W. G. F. Phillimore*, for the defendants, the owners of the *R. L. Alston*, and the owners of her cargo. The rate of speed referred to in the 22nd clause of the bye-laws is the rate of six miles per hour through the water, and accordingly the *Lady Mostyn* is to blame for proceeding at the rate of about eight knots through the water.

SIR ROBERT PHILLIMORE. In this case the *Lady Mostyn* was admittedly proceeding down the river Tees with a speed of five knots over the ground a few seconds before the collision, and as she had a tide of about three knots against her she was then going at the rate of about eight miles an hour through the water. Now the 22nd clause of the regulations for the navigation of the river Tees, in which river this collision took place, provides that "no steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of six miles per hour." I am of opinion that I must put a natural construction upon the words of this rule, and this leads me to the conclusion that the framers of the regulations meant to prohibit vessels proceeding against the tide going at a speed of more than six miles through the water. These regulations are framed with regard to the circumstances of all the cases to which they are to be applied, and I must pronounce in this case that the *Lady Mostyn*, by proceeding at a speed of more than six miles through the water, was guilty of negligence contributing to the collision.

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Webster, Q.C. As the Court is of that opinion no evidence will be offered for the defendants, and the counter-claim will be withdrawn.

SIR ROBERT PHILLIMORE. I pronounce both vessels to blame.

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Co.*

Solicitors for defendants: *Pritchard & Sons.*

G. B.

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Feb. 21.

THE GUY MANNERING. (1881 W. 1715. Fo. 183.)

*Damage—Pilot compulsorily taken on Board but not compulsorily in Charge—
Liability of Shipowner for Collision in Suez Canal solely caused by Negligence of Suez Canal Company's Pilot.*

Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal Company's pilot compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damages arising out of the collision.

Semble, the effect of the Regulations for the Navigation of the Suez Canal is to constitute the pilot taken on board a ship traversing the canal the adviser of the master, and to leave the control of the navigation of the ship solely with the master.

Appeared in appeal Feb 1882

THIS was an action of damage brought by the owners of the screw steamship *Wistow Hall*, against the screw steamship *Guy Mannering*.

Subsequently to the delivery of the statement of defence a special case was, with the consent of all parties, stated in the action. Such special case was in the following terms:—

1. This is an action for damages by collision brought by the plaintiffs as owners of the British screw steamship *Wistow Hall*, of 1729 tons register, against the British screw steamship *Guy Mannering*, of 2817 tons register, whose owners have appeared and are the defendants.

2. The collision occurred on the afternoon of the 4th of December, 1880, in the Suez Canal. The *Wistow Hall* and the *Guy Mannering* were both proceeding in the same direction, namely, towards Suez, the *Wistow Hall* being the headmost vessel. The *Wistow Hall* had to stop her way in order to allow some vessels coming from Suez to pass, and it was the duty of the *Guy Mannering* to stop her way also so as not to run into the *Wistow Hall*, but the proper measures were not taken in time on board the *Guy Mannering*, and before her way was stopped she forged ahead into the *Wistow Hall*, so that her stem cut into the stern of the *Wistow Hall*, and did the damage complained of.

3. The facts are that upon the occasion in question the engines of the *Guy Mannering* were stopped, but she still went on ahead with the way she had had previously, that the master of the *Guy*

Mannering saw that his vessel was approaching too close to the *Wistow Hall*, and informed the pilot of it and suggested to him that the engines should be moved astern. The pilot, however, refused to give the order to the engines, whereupon the master, having more than once suggested to the pilot to give the order, gave it himself, but too late, and though it was obeyed the collision ensued. The plaintiffs admit that the collision was solely caused by the pilot's negligence.

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4. The defendants admit that this collision was caused by the bad navigation of the *Guy Mannering*, and that her master and crew were their servants, but they claim to be exempt from liability for it on the ground that they were compelled by the law in force in the Suez Canal, to which all vessels passing through the said canal are subject, to give up charge of the navigation of their ship to one of the pilots employed by the Suez Canal Company, whom they had taken on board, and on the ground that the collision was entirely occasioned by his bad navigation.

5. The provision for the employment of pilots in the Suez Canal is contained in Article 4 of the Regulations for the Navigation of the Suez Maritime Canal, which article is as follows:—

“Every vessel measuring more than one hundred (100) tons gross must take on board a company's pilot for the whole length of the canal, who will indicate all particulars concerning the passage through. The captain is held responsible for all groundings and accidents of whatsoever kind resulting from the management and manœuvring of his ship.”

“Pilots place at the disposal of captains of vessels their experience and practical knowledge of the canal, but as they cannot be specially acquainted with the defects or peculiarities of each steamer and her machinery in stopping, steering, &c., the responsibility as regards the management of the ship devolves solely upon the captain.”

6. The plaintiffs admit that these regulations are lawfully in force, and that the pilot taken on board the *Guy Mannering* was a company's pilot, and was on board her by virtue of these regulations.

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7. Copies of the statement of claim and statement of defence and of the Regulations for the Navigation of the Suez Maritime Canal are annexed to, and are to be taken as part of, this special case.

8. The question for the opinion of the Court is whether the defendants are liable or are exempt from liability for the aforesaid bad navigation of their ship.

9. If the defendants are liable judgment is to be entered for the plaintiffs with costs and with the usual order for reference of the damages to the registrar and merchants.

10. If the defendants are exempt from liability judgment is to be entered for them with or without costs, or with such portion of the costs as to the Court may seem just.

Contained in the copy of the Regulations of the Suez Canal annexed to the special case, were the following extracts from the Act of Concession of the 5th of January, 1856:—

Art. 14. We hereby solemnly declare for ourselves, and for our successors, under reserve of ratification by H.I.M. the Sultan, the great maritime canal from Suez to Pelurium, and ports belonging to it, henceforth and for ever open as neutral passages to any neutral merchant vessel crossing from sea to sea without any distinction, exclusion, or preference whatever for persons or nationalities, against the payment of dues and execution of regulations established* by the said Universal Company granted for the working of the said canal and its dependencies.

Art. 17. To indemnify the company for the expenses of construction, maintenance, and working devolving upon them by these presents, we authorize the company henceforth and during the whole term of their lease, as determined by clauses 1 and 3 of the preceding article, to establish and levy for the passage through the canals and ports thereunto appertaining, navigation, pilotage, towage, tracking, or berthing dues, according to tariffs which they shall be at liberty to modify at all times upon the following express conditions:—

1. That these dues be collected without exception or favour from all ships under like conditions.

2. That the tariffs be published three months before they come

into force in the capitals and principal commercial ports of all nations whom they may concern.

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3. That for the special navigation due the maximum toll shall not exceed ten francs per ton of capacity on vessels and per head of passenger.

Feb. 14. The special case was argued.

W. G. F. Phillimore, for the plaintiffs. The defendants can only exempt themselves from liability by shewing that the master of the *Guy Mannering* was bound by the law in force in the Suez Canal not only to take a pilot on board the *Guy Mannering*, but also to allow the pilot to act in charge of the vessel. It is clear from the Suez Canal Company's regulations that the pilot whom it is required that vessels passing through the canal should take on board is not a "pilot" in the general sense, but merely a guide sent on board for the purpose of indicating the channel through the canal.

Butt, Q.C., and *Nelson*, for the defendants. The Suez Canal Company are only entitled to charge pilotage dues on the terms of providing duly qualified pilots to perform the ordinary duties of pilots, and it is not competent for the company to claim the full benefit of these dues and at the same time impose a limitation upon the services to be rendered in return. Whatever provisions are contained in the Regulations for the Navigation of the Suez Canal with respect to the responsibility of the masters of vessels traversing the canal, are only inserted to enable the Canal Company to obtain compensation for damage to the canal and the other property belonging to them, and to prevent them being rendered liable for damage occasioned to ships passing through the canal.

Phillimore, in reply.

Cur. adv. vult.

Feb. 21. SIR ROBERT PHILLIMORE. This case comes before me in the form of a special case. It is an action for damage by collision. The plaintiffs are the owners of the British screw steamship *Wistow Hall*, and the defendants are the owners of the British screw steamship *Guy Mannering*. The collision took place

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on the 4th of December, 1880, in the Suez Canal. The *Guy Mannering* had on board one of the regular Suez Canal Company's pilots, and the damage was caused by her engines not having been moved astern in time. The pilot refused to give the order to the engines to move astern, although that manœuvre was more than once suggested to him by the master, until too late to avoid the collision. It is admitted that the collision was solely caused by the negligence of the pilot, and that the master and crew were the servants of the defendants. But the defendants claim exemption from liability on the grounds that they were compelled by the laws in force on the Suez Canal to give up the charge of the navigation to one of the pilots employed by the Suez Canal Company, and that the collision was entirely caused by his bad navigation. The provision for the employment of pilots in the Suez Canal is contained in Article 4 of the Regulations for the Navigation of the Suez maritime canal which article is as follows : [His Lordship read the 4th article of the Regulations of the Suez Canal as above set out in the special case.]

The question for the opinion of the Court is whether the defendants are liable for the aforesaid bad navigation of their ship. The defendants maintain that inasmuch as the pilot on board the *Guy Mannering* was taken on board by compulsion of law the master is not responsible for the bad navigation of the ship which caused the collision. It must be remembered that this exemption from liability is founded upon the principle that the pilot is taken by compulsion of law, and that to him is committed the sole charge of the ship. These, at least, are the positions of British law which were relied upon by the defendants ; but in the present case it is expressly declared in the 4th article of the Suez Canal Regulations that the duty of the pilot is to act as the adviser of the captain in matters requiring local and practical knowledge of the canal ; but that the responsibility as regards the management of the ship devolves solely upon the master. This regulation appears to me to alter the usual relations of the master and pilot, and to take away the reason of the law upon which the exception rests. It has been argued on behalf of the defendants that this regulation is *ultra vires* and therefore bad, and much has been said upon Article 17 of the Act of Concession

of the 5th of January, 1856, which authorizes the company to establish and levy pilotage and other dues, and it was urged that these pilotage dues must mean dues to be levied in respect of persons who should exercise all the usual functions of a pilot according to British law and should take the entire charge of the navigation of the ship. I am unable to assent to these propositions. I am of opinion that I must assume that these Canal regulations were made by competent authority and are not *ultra vires*, and it may be remarked in passing that if they are *ultra vires* the pilot would not have been taken on board by compulsion of law. I have only the 14th and 17th articles of the Act of Concession of 1856 before me, and from these articles I cannot infer any legal disability on the part of the company to frame the regulations in question. Upon the whole I am of opinion that the defendants are liable for the bad navigation of their ship and the damages consequent thereupon.

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MANNERING.Solicitors for plaintiffs: *Pritchard & Sons.*Solicitors for defendants: *Lowless & Co.*

G. B.

THE HELENSLEA. (C. 6708. Fo. 498.)

THE CATALONIA. (S. 5926. Fo. 504.)

1881
Jan. 24.

Practice—Writ in Personam—Incorrect Address of Defendant—Refusal of Consolidation Order before service of Writ.

The Court will refuse to consolidate cross actions of damage in personam where there has been no service of the writ in the principal action.

A shipowner, residing and carrying on business in Scotland, having been described on the face of a writ of summons for service within the jurisdiction sued out against him in an action of damage in personam as "of the city of London," applied before service of the writ and after a cross action of damage in respect of the same collision had been instituted on his behalf that the writ should be set aside. The Court refused the motion.

On the 25th of December last a writ of summons in personam for service within the jurisdiction was taken out by Messrs. Gregory, Rowcliffe, & Co. on behalf of the Cunard Steamship Company, Limited, directed to William Stephen, "of the city of London," and indorsed as follows: "The plaintiffs, as owners of

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the steamship *Catalonia*, claim the sum of 10,000*l.* against the defendant, as owner of the barque *Helenslea*, for damage occasioned by a collision which took place in or near Cork harbour in the month of December, 1881, between the *Helenslea* and the *Catalonia*, including costs of suit."

The action in which this writ was taken out was entitled *The Helenslea* (C. 6708.) The next day a cross action of damage in personam in respect of the same collision entitled *The Catalonia* (S. 5926) was commenced on behalf of William Stephen by the issue of a writ of summons directed to the Cunard Steamship Company, and that company, on the 3rd of January, duly entered an appearance in obedience to such writ, and on the same day their solicitors took out a summons in the action in which they had so appeared calling upon the plaintiff William Stephen to shew cause why that action should not be consolidated with the action *The Catalonia* (S. 5926.) This summons was referred to the judge, and before it came on for hearing notice of motion was given on behalf of William Stephen that the judge would be moved to direct that the writ taken out in the action entitled the *Helenslea* should be set aside.

In support of the summons an affidavit was brought in, from which it appeared that the solicitors who were retained on behalf of William Stephen in the action brought on his behalf against the Cunard Steam Company had refused to accept service of the writ issued against him in the principal action, and that the questions to be determined in the two actions were exactly the same, and that a decision in one would certainly decide the other.

In an affidavit filed in support of the motion to set aside the writ in the action entitled the *Helenslea*, William Stephen deposed that he was the sole owner of the *Helenslea*; that he resided and carried on business at Dundee, in Scotland, and had no residence or place of business in England; that the writ against him in action C. No. 6708, had never been served, and that he was advised and believed that he was entitled to have such writ set aside as improperly issued upon untrue representations as to his place of residence, and that without such untrue representations such writ would not have issued.

Jan. 24. The motion and summons came on before the judge. It was agreed that the affidavits brought in by the parties should be read as evidence in both actions.

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W. G. F. Phillimore, for William Stephen, the owner of the *Helenslea*. If the writ sought to be set aside was intended for service without the jurisdiction it was illegally issued, as the collision occurred without the territorial jurisdiction of this Court, and the *Helenslea* has not been arrested: *The Vivar*. (1) On the other hand, if it is contended that it is a writ for service within the jurisdiction, it is clear that it is irregular and ought to be set aside, as it contains a false statement as to the residence of the defendant within the jurisdiction; and the form in the schedule to the Judicature Act, 1873, shews that a writ for service within the jurisdiction should only be used in cases where the defendant has a residence within the jurisdiction. As to the summons for consolidation, it must be rejected if the writ against William Stephen be set aside. But even if the Court decides that the writ must stand, no consolidation order can be made, for it is contrary to the practice of the Court to consolidate actions where in one of the actions which it is sought to have consolidated, there has neither been bail given, a warrant issued, nor personal service effected.

Butt, Q.C., and *Myburgh*, for the owners of the *Catalonia*. The writ directed to William Stephen has been issued for service within the jurisdiction. It is intended that the defendant should be served with the writ if he comes within the jurisdiction, and if at that time the description of the defendant's address should be shewn to be wrong the Court would amend the description as of course. Moreover Order II., rule 3, allows of such variations being made in the form of writ "as circumstances may require." There is no objection in principle against consolidating the two actions. The Cunard Steam Company were the first parties to sue in respect of the collision in this case, and the Court should assist them in obtaining the conduct of the proceedings.

SIR ROBERT PHILLIMORE. I am of opinion that I cannot grant the motion to set aside the writ issued on behalf of the Cunard

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Steam Company. The writ in question is not a writ for service out of the jurisdiction, it is simply a writ for service within the jurisdiction, and it is said that it has been taken out in order that the defendant may be served with it if he comes within the jurisdiction at any time whilst it remains in force. At present it seems to me that no sufficient reason has been shewn why it should be set aside as irregular, and I must therefore reject the motion. It may be that hereafter some reason which does not exist at present may arise in favour of a similar motion being granted, but as to that I express no opinion.

I do not think I can make any consolidation order in this case. Service of the writ taken out by the Cunard Steamship Company has not been made or accepted, and in these circumstances I am of opinion that I ought not to order the two actions to be consolidated. Two suits can only I think be consolidated after each of them has become a *lis pendens*; and it is clear that a suit in *personam* does not become a *lis pendens* until after service of the writ of summons. On this point the well-known case of *Ray v. Sherwood* (1) is an authority.

[On the 3rd of March the action brought by the owners of the *Helenslea* came on for hearing, but before any witnesses had been examined a settlement was arranged between the parties.]

Solicitors for Cunard Steamship Company : *Gregory, Rowcliffe, & Co.*

Solicitors for William Stephen : *T. Cooper & Co.*

(1) 1 Curteis, 173, 193, affirmed on appeal, 1 Moo. P. C. 353.

BROWNRIGG v. PIKE AND ANOTHER.

1882

Feb. 28.

Will of Realty—Appointment of Executor—Married Woman—Arrears of Rent personally—Right to Probate.

A married woman having a power of appointment over real property executed the power in favour of herself. She afterwards made her will, by which she directed (amongst other things) that a portion of the property should be sold to pay legacies and to erect a memorial window. She also appointed an executor. There were arrears of rent due at the time of her death and subsequently :—

Held, that as she possessed the property as separate estate, and had appointed an executor and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the will was entitled to probate.

THIS was a demurrer to a statement of claim propounding the will, dated the 28th of January, 1881, of Elizabeth Pike, late of Newport Pagnel, in the county of Buckingham, wife of the defendant Thomas Henson Pike.

By the will the deceased gave “all my real estate which I have power to dispose of” to her husband for life, and directed (amongst other things) that after his death certain portions of the estate should be sold to pay certain legacies and the cost of a memorial window, and the will appointed the plaintiff, John Studholme Brownrigg, executor. To this the defendants demurred, “on the ground (amongst others) that it does not shew that the will in question is entitled to probate.”

Feb. 24. *Inderwick, Q.C.*, and *Bayford*, for the demurrer. The will disposes of real estate only, for though the deceased may have had personal property she has by the terms of the will only disposed of realty, and the executor can only deal with what she has disposed of. The deceased was entitled to the property by virtue of a power, and in such a case the mere appointment of an executor is not sufficient: *In the Goods of Tomlinson* (1); *Tugman v. Hopkins*. (2)

Patchett, Q.C., *Anderson*, and *Whitworth*, in support of the statement of claim. The deceased became entitled to the property under her father's will, which gave her power to vest it

(1) 6 P. D. 209.

(2) 4 M. & Gr. 389.

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as she thought proper. That power she executed by a previous document and thereby vested it in herself, and the property then became her separate estate. She therefore by the will dealt with the property as separate estate, as to which she had the same powers as a feme sole. The arrears of rent also are personal property: *Vaughan v. Vanderstegen* (1); *Fettiplace v. Gorges* (2); *Taylor v. Meads* (3); *Johnson v. Gallagher* (4); *In the Goods of Jordan* (5); *Williams on Executors*, 8th ed. p. 231.

Inderwick, Q.C., in reply.

Cur. adv. vult.

Feb. 28. THE PRESIDENT. This was a demurrer to a statement of claim by the executors of the will of a married woman. The statement of claim set out the circumstances in which this will was made. It appears that real property was settled or devised—devised to trustees upon trust for such intents and purposes and in such manner and form as the deceased by any deed or deeds by her duly executed or by her last will and testament should appoint, whether covert or sole.

The testatrix executed the power so conferred upon her by a deed of the 18th of April, 1878, and conveyed this property to trustees upon trust for herself, her heirs and assigns, for her sole and separate use. Then follow some words which, it appears to me, do not affect her powers of disposition in any way, though their exact meaning is not very clear, to the intent that the said real estate might not be sold, but remain and be dealt with and descend as real estate. After having executed that deed she made her will, which was the subject of this litigation, and by that she gave and devised all her real estate which she had power to dispose of unto her husband for the term of his natural life, and after his death then she devised portions of the estate to different people, and as to the residue of her real estate she gave and devised it to John Studholme Brownrigg, upon trust to sell and to pay the following legacies. And then, after mentioning the legacies, she goes on: "I empower my executor to lay out a

(1) 2 Drew. 165.

(3) 34 L. J. (Ch.) 203.

(2) 1 Ves. 46.

(4) 3 De G. F. & J. 494, 509.

(5) Law Rep. 1 P. & D. 555.

(3) 34 L. J. (Ch.) 203.
(4) 3 De G. F. & J. 494, 509.

sum not exceeding £200 as he may deem expedient in placing a memorial window in Moulsoe Church; as to the residue in trust to divide the same equally between the said Katharine L. V. Studholme Brownrigg and the said John Studholme Brownrigg. Then, revoking all other wills, I appoint John Studholme Brownrigg executor." There is a further allegation in the statement of claim that the said Elizabeth Pike was at the time of her death possessed of or entitled to personal estate belonging to her and for her separate use, to wit, arrears of rent due from the tenant or tenants of the residuary real estate of the said William Pike, and to apportioned parts of accruing rents become due since her death, but she was not possessed of or entitled to any other personal estate.

To that statement of claim there is a demurrer.

It is to be observed that this will is not made in execution of the power. The power was executed by the deed of the 18th of April, 1878, and by that deed the property became settled to the separate use of the wife, with precisely the same effect as if it had been so settled by a third person. The nature of the wife's interest was thus changed, and from power it became property with all its incidents, and amongst these incidents is the right to dispose of it by will, and in the Ecclesiastical Courts, as well as Courts of Equity, a married woman has always been regarded, with respect to her separate property, as being in the same position as a feme sole.

If, then, Mrs. Pike had been a feme sole, and had executed this will, would it have been entitled to probate? In the first place it is said that it deals only with realty, and is, therefore, not entitled to probate. It is not, however, the fact that this will is limited to the disposition of real estate. In the first place an executor is appointed by it, and this has been held to entitle a will to be admitted to probate, though it disposes of real property only: see *Williams on Executors*, 8th ed. p. 231; *Beard v. Beard* (1); *O'Dwyer v. Geare*. (2)

But further it is admitted on the pleadings that this lady died possessed of personalty. This would be sufficient for the purposes of argument on demurrer, but it may be as well to add that it

(1) 3 Atk. 72, 73.

(2) 1 Sw. & Tr. 465.

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appears to me that the arrears of rent which accrued due in the lifetime of the testatrix were part of her personal estate: *Bac. Abr.* 63, Exors. H. 3, and also that upon her death the rents became apportionable, and that the portion to be attributed to her up to the time of her death was part of her personal estate: *Capron v. Capron*. (1) It follows from the fact that this personal estate of the deceased proceeded from her separate property, that it is also for her separate use and capable of being disposed of by her: *Ashton v. McDougal*. (2)

Thus it appears that the testatrix died possessed of personal property which she was entitled to dispose of by will, and that she has appointed an executor. It was not disputed that in these circumstances if the testatrix had been a feme sole her will would be entitled to probate.

The authorities are clear upon the point. "To appoint an executor," says Swinburne (*Swinb. pt. iv. s. 2, pl. 2*; Williams on Executors, 8th ed. p. 230), "is to place one in the stead of the testator, who may enter into the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels towards the payment of the testator's debts, and the performance of the will."

And Mr. Justice Williams adds (*Williams on Executors*, 8th ed. p. 231): "The bare nomination of an executor without giving any legacy or appointing anything to be done by him is sufficient to make it a will, and as a will it is to be proved": citing *God. pt. 2, c. 5, s. 1*. In the present case, however, there is something to be done by the executor. The will directs that a memorial window shall be erected. This duty is to be discharged by the executor, and if the proceeds of the real estate had not been sufficient to do more than pay the legacies, the executor would have been bound to apply the personalty to this purpose.

But it was contended that this will does not, in fact, dispose of the personalty, and, therefore, that the executors do not take jure representationis. For this the case of *Tugman v. Hopkins* (3) was cited, but it will be found that Tindal, C.J., expressly rests his judgment on the fact that the will then before the Court was

(1) Law Rep. 17 Eq. 288.

(2) 5 Beav. 56.

(3) 4 M. & Gr. 389.

made under a power. The passage I refer to is as follows (p. 400):
 “But then it is said that although these accumulations were not disposed of by the wife, yet, executors having been appointed, the law vested the money in them. But the authority of these executors is only co-extensive with the power given by the will, for the executors here do not take jure representationis, but under the power which the wife was authorized to exercise by making a will as to this particular property.”

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But I have shewn that in this case the will is not made under the power but by virtue of the right which a married woman has to make a will in respect of her separate property. By appointing an executor her separate personal estate vests in him to be got in by him, and applied either according to the provisions of the will or as the law directs. For these reasons I hold that this will is entitled to be admitted to probate, and I overrule the demurrer, and direct that the trial of the issues of fact be proceeded with.

Solicitors for plaintiff: *Pattison, Wigg, & Co.*

Solicitor for defendants: *G. P. Rogers.*

R. A. P.

IN THE GOODS OF FRANK LEYLAND WHITE.

March 8.

Will—Construction—“Money”—Residue.

A testator bequeathed “the whole residue of money” to A. H. W., “excepting such things as the under-mentioned,” &c.:—

Held, that the words were sufficient to pass the residue.

FRANK LEYLAND WHITE, late of Melville Place, in the city of Liverpool, book-keeper, deceased, died on the 15th of September, 1881.

The deceased made his will on the 11th of September, 1881, in the following words:—

“There is a statement of accounts owing by me to different tradespeople and friends. After these are paid the whole residue of money to be handed to my sister, Ann Harnett White, excepting such things as the under-mentioned specified to certain individuals.

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IN THE GOODS OF WHITE. "Black portmanteau all clothes to James Blythe Page, 'brigand and apothecary' to Hannah Monck, unframed picture of horse to Jane Page."

The will was signed and attested, and then followed the statement of accounts referred to.

No executor was appointed by the will, and the testator's sister mentioned in the will was a minor.

Pritchard moved for grant of letters of administration to J. C. White as guardian of the sister. She is, under the terms of the will, residuary legatee: *Re Bassett* (1); *Wiggins v. Wiggins* (2); *Leighton v. Bailie* (3); *In the Goods of Cadge* (4); *In the Goods of Bloomfield*. (5)

THE PRESIDENT. 'I think the word "money" in this will is, when taken with the context, used in a general sense, and is sufficient to pass the residue. The grant may therefore be made as asked for.

Solicitors: *C. P. Pritchard & Marshall*.

R. A. P.

March 8.

JONES v. JONES.

Will affecting Real Estate—Assignee—Leave to cite—20 & 21 Vict. c. 77, s. 61.

In an action as to the validity of a will the Court will not order the assignee of the heir-at-law of the testatrix to be cited as a person having or pretending interest in the real estate affected by the will.

THIS was an action for revocation of probate.

Hannah Jones, late of Glanrhyd, in the parish of Lanfairnewbwl, in the county of Anglesey, widow, died on the 8th of April, 1876, having, by her will dated the 6th of April, 1876, devised a freehold farm to Owen Jones, who duly obtained probate of the will.

Owen Jones devised the farm to his wife, Elizabeth Jones, and

(1) Law Rep. 14 Eq. 54.

(3) 3 My. & C. 267.

(2) 2 Sim. (N.S.) 226.

(4) Law Rep. 1 P. & D. 543.

(5) 31 L. J. (P. & M.) 119.

died on the 14th of July, 1879, and probate of his will was duly obtained by his widow.

John Jones, heir-at-law and one of the next of kin of Hannah Jones, brought this action against Elizabeth Jones for revocation of the will of Hannah Jones; and in his affidavit of documents it appeared that he had assigned to his brother Robert Jones all his interest as heir-at-law of Hannah Jones.

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Searle, for the defendant Elizabeth Jones, moved, under 20 & 21 Vict. c. 77, s. 61 (1), for leave to cite Robert Jones as interested in the real estate of the deceased Hannah Jones. The words of the section are very large, "having or pretending interest." If this were a will of personalty, Robert Jones would, as a matter of course, have a right to intervene.

Clement Lloyd, *contrà*. The interest contemplated by the words of the statute is an interest by descent, as e.g. that of the devisee of a devisee. The application is too late, as the action will be heard next week.

THE PRESIDENT. This is a novel application, and one which the Court ought not to grant. It is also unnecessary, as the assignee will be bound by the decision in the action as completely as his assignor.

Application refused.

Solicitors for plaintiff: *Radford & Frankland*.

Solicitors for defendant: *Bloxam & Co.*

(1) The following are the material parts of the section: Where proceedings are taken for revoking the probate of a will on the ground of the invalidity thereof . . . unless . . . the will affects only personal estate, the heir-at-law,

devisees, and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings.

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March 14.

MORRELL AND OTHERS v. MORRELL AND OTHERS.

Will—Mistake—Words introduced without the knowledge or approval of the Testator.

A testator, in the instructions for his will, directed that all his B shares should be given to his nephews, but the word "forty," was inserted several times in the will before the word "shares," and the will was executed with that word repeated several times before the word "shares." The jury found that the word "forty" was introduced by mistake, that the clauses including the word were never read over to the testator, and that he only approved of the will upon the supposition that all his B. shares were given to his nephews, and thereupon the Court ordered the word "forty," wherever it occurred in the will, to be struck out.

IN this case the plaintiffs propounded the will and codicil dated respectively the 19th day of July, 1880, and the 11th day of June, 1881, of John Morrell, late of Mordansweld Road, Birkdale, in the county of Lancaster, gentleman, who died on the 16th day of June, 1881. They also alleged that the will named the plaintiffs legatees of the testator's fully paid-up B shares in John Morrell & Co., Limited, but the word "forty," had been inserted as limiting the number, and that that word wheresoever inserted was inserted by mistake, and the insertion thereof was not known to the testator nor approved by him at the time of execution of either the will or codicil. The defendants, the executors, and also the residuary legatees, denied the allegation that the word "forty" had been inserted by mistake or without the knowledge or approval of the testator.

Inderwick, Q.C., and C. A. Middleton, for the plaintiffs.

Sir H. Giffard, Q.C., and Bayford, for the defendants.

Dr. Deane, Q.C., and Bargrave Deane, for residuary legatees.

The testator, Mr. John Morrell, was a provision merchant in Liverpool, and in May, 1880, converted his business into a limited liability company, under the title of "John Morrell & Co., Limited." The capital of the company was 100,000*l.*, divided into 1000 shares of 100*l.* each, and the testator received 30,000*l.* in money and 40,000*l.* in fully paid-up shares, which were called "B or deferred shares." This amount was in 400 shares of 100*l.* each. In the same month, and before these shares were allotted

to him, he instructed his solicitor, Mr. Jevons, to draw up his will. Mr. Jevons took the verbal instructions of Mr. Morrell, and reduced them to written memoranda, of which there were several successive drafts. In Mr. Jevons's written "estimate of value and income of property of John Morrell, Esq." there appeared among the items "shares in John Morrell & Co., Limited, 40,000 £ ;" but in the memoranda of instructions for the will, Mr. Jevons wrote: "Bequeathed testator's shares in John Morrell & Co., Limited, to his nephews George Morrell and Thomas Morrell (sons of testator's brother George), John Morrell the younger (son of testator's brother Robert Morrell), and Thomas Dove Foster (son of testator's sister Mary Foster, deceased), in equal shares." The memoranda so worded were sent to a conveyancing counsel in London, to whom were also forwarded the articles of association of "John Morrell & Co., Limited," and the counsel in drawing the will put the bequest of the shares to the four nephews thus:—"In equal shares, the forty fully paid-up or deferred shares, of the value of 100 £ each, in John Morrell & Co., Limited." In four different passages of the will the bequest was alluded to in these same terms; and, in a passage making the bequest free of legacy duty, Mr. Jevons copied the words used by the conveyancer. These terms in effect gave only 4000 £ , instead of 40,000 £ , among the four nephews, the conveyancer having treated the shares as if they were only 40 in number, while in reality they were 400. It further appeared that, though Mr. Jevons's draft instructions for the will had been more than once read to the testator, the will, as a whole, never was, Mr. Morrell himself having said it was unnecessary to read it to him when, in July, 1880, he was about to execute it, and the will was executed with the bequest in the terms drawn by the conveyancer.

Mr. Jevons gave evidence to the effect that beyond all doubt Mr. Morrell intended that the whole 400 shares of 100 £ each should be divided among his nephews; and Mr. Morrell's widow, who had been examined by commission, deposed to the same effect. The testator had told her, she said, of his intention before he made the will, and on various occasions in a period extending from the time of the execution of the will to the date of his death he spoke to her of his having left each of his nephews shares of

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the value of 10,000*l*. Mr. Stead, a friend of the testator, gave corroborative evidence.

Feb. 14. THE PRESIDENT. Gentlemen of the jury. This case though it may appear simple in itself, is one of very great importance with reference to other cases hereafter in which the facts may not be so clear as they appear to be here. There can be no graver question brought into a court of law than the question, what is a man's last will when he is dead and no longer able to speak for himself, and his property has to be distributed according to the particular words that have been used in a particular instrument. The law has established certain rigid safeguards in order to have attested evidence of what such intention was; and no amount of proof that a man intended to give A or B the whole or part of his property avails. He must put his intentions in writing, and that writing and his signature to it must be attested by two witnesses. If, therefore, a mistake is made, it matters not how plainly, in leaving out words, however much you may regret their omission, we cannot after his death correct that, because his intention would not have been put into writing and attested as the law requires.

There is a second class of mistake, viz., where words are inserted of which the testator knows nothing. To take a familiar instance, suppose people about the testator at the time of his death take his instructions to leave his property to certain persons and fraudulently introduce into the will their own names instead, and say, "I leave to Tom Smith, 10*l*," &c., and never read that to him. In that case you may strike out the passage, because he did not know it was there or intend that it should be, and therefore it was not his will in any sense of the word.

But there is another case, and this case is somewhat of that kind. It is the case of a man who feels himself unable to express his intentions in a legal and formal manner, and who confides to somebody else the duty of expressing them. I should say that in the majority of cases where a lawyer is employed that is the state of things. The testator prefers to rely on the judgment and skill of a trained mind to express his wishes rather than to run the risk of selecting words himself, and when that is the

case he adopts the words used by that person just as though they were his own. There is no difference between the case of his referring it to a particular person to express his wishes who makes the mistake, and himself, knowing what his own wishes are and setting about to express them, making the mistake. He might foolishly attempt to use technical language; if, for instance, he had put down heir-at-law when in fact he meant next of kin, he must bear the consequences; and so if he trusts to anybody else to express his wishes and adopts the words used by that person as his own, then that alone can remain as the evidence of his intention.

You must bear these observations in mind while I comment on the particular questions, which I trust will lay the foundation for a clear if not perfectly satisfactory conclusion in this case. I shall take them in the order in which I gave them.

As the case is presented on the pleadings, the alleged mistake is that the word "forty" has been introduced throughout the will before the word "shares." In order to see whether there was the particular mistake of the insertion of the word "forty" before "shares," or whether there was any other mistake in the drawing up of that clause, it is well to look in the first instance to the instructions which were given by the deceased to Mr. Jevons. In that document there is no mention whatever of the number of shares, but the testator's property, which we now know was of the value of 40,000*l.* in the company, is spoken of simply as his shares. There is no mention of anything but shares, and that continues throughout all the documents down to the time when the draft is sent back by the counsel to Mr. Jevons. The instructions or directions to counsel to draw the will also only mention "shares" without any reference to number, but from some cause or other which is not explained, the counsel who drew the will inserted into his draft the word "forty" before "shares" wherever it became necessary.

The first question I ask you is, was there a mistake at all in that? Now, the evidence of Mr. Jevons is quite clear upon the subject, that whenever the matter was discussed the reference was to the whole number of the shares as being intended for the nephews. The wife, whose deposition has been read, is equally

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clear that her husband always spoke of the whole of his shares as intended for his nephews; and a friend has been called who speaks to the same effect. I should imagine, therefore, that you would come to the conclusion that there is a mistake in the manner in which that clause is drawn.

But then that leads to the second question, viz., whether the mistake was in putting in the word "forty" at all and in not leaving it as it was in the instructions, "My shares in the company," or does the mistake consist in not having put in the proper number "four hundred" instead of "forty." It is true that if four hundred had been put in it would, we know, have correctly carried out the intention as Mr. Jevons and the testator's wife believe it to have been, but it is not because it would in fact have carried out his intention that therefore that is the way it should have been expressed in his will, and I should say that the more correct way of drawing a will from such instructions as these is not to insert a number which may lead to a mistake, as you see it has done in this case, but to use the general words which prevent the possibility of a mistake, namely, by saying "All my shares" or "the shares" which equally implies it. Did then the mistake consist in inserting any number, or in not inserting the proper number?

The third question which I leave to you is, Did he know of the inserting of the word "forty"? That depends on Mr. Jevons's evidence, and I am sorry that we should be left in some uncertainty as to what really took place. Mr. Jevons went on the 10th of July with the draft which had been prepared by counsel, and so fully did it to his mind embody the wishes of the testator that he as a matter of prudence had it then and there executed, and the question is, did he read that document over to the testator. I am sorry to say Mr. Jevons is not able to say whether he did or not; but you will remember that he himself said that would be the usual course, but at the present moment he says "my recollection is indistinct upon the point as to the extent to which I went into the draft will with the testator;" but he speaks with confidence as to the following, "I read the passages which made alterations in the draft which he had had in his possession." I am sorry we have not more distinct recollection of what took place. I can

only say it seems most unusual not to do one or other of these two things, viz., either to read over the whole of the document which the party is about to sign or to go through it passage by passage, and say there is a clause to this effect and a clause to that effect and so on. In some states of a testator's health or in some states of a testator's mind disturbed by pain it might be expedient to shorten the process, but in some way or other, so far as my experience goes, I should say it is the practice of solicitors either to read over the whole instrument or to read and explain clause by clause the effect that each clause would have. Unfortunately Mr. Jevons does not enable us to judge by his evidence what course he did pursue, and you have to draw your inference, but remembering that this was the document which he then got the testator to sign as a valid will, it will be for you to say whether you do not come to the conclusion that Mr. Jevons did either by reading the whole or in some way or other call his attention to the several matters of his will. He does say he read the passages which made alterations in the draft which he had had in his possession, but then there comes a very important fact. He called his attention to this question of the legacy duty, and that is repeated twice over in the will. He had the draft with him, and he says that as to one of these alterations in which the word "forty" occurs he made it himself upon the draft; as to the other, he is rather under the impression that he made it at the office for the purpose of making the one part of the draft consistent with the other. But with regard to that alteration which he made at the time you will have to say whether you do or do not believe that he read that passage to him in which the word "forty" undoubtedly occurs.

Therefore the two questions which you have to consider as to that are, did he read or bring to the testator's notice the one particular instance in which at any rate the word "forty" was inserted before "shares"?

Upon the fourth question, "Did he approve of the words used as the expression of his wish," I must more fully explain what I have already suggested. When you employ a lawyer either to draw a will or a deed which requires skill you rely on his skill

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and, of course, you rely on his integrity, and when he tells you "I have drawn this will according to your instructions," and he puts it before you to sign, do not you adopt his words as expressing your wish? I do not desire, as far as this is a question of fact, to take it out of your hands, but, speaking for myself, it appears to me the man does approve of the words which his solicitor puts in for him. And this seems to divide itself again into two parts, did he approve of the particular words being used as the expression of his will, that is, did he approve of such passages as his attention was particularly directed to, or generally did he approve the whole will as expressing his wishes? When a man leaves his solicitor to draw a will does he not say in effect, I do not know how to do it; I rely on you and I accept your words as though I had the power to do it.

The next question is, did he understand the effect of the words? He was a man in failing health and nervous, and business had become so distasteful to him that he did not open his letters. Mr. Jevons himself, also in two instances, wrote the word "forty" in with his own hand, and did not understand or notice what the effect was. You probably, therefore, would come to the conclusion that the testator was equally wanting in observation as Mr. Jevons, and did not understand the meaning of the words. Lastly, did he intend his nephews to have all or only the forty shares? That is a question upon which probably you will have no difference of opinion, but I have put the question in order that we may have, as far as counsel and myself can foresee, everything that may be necessary for determining the law of the case after you have decided the facts.

The jury, after deliberating for a short time, found as follows: 1. That the words were inserted by mistake; 2. That the particular mistake was in inserting the word "forty"; 3. That the testator did not know of the insertion of the word; that it was not read over to him; 4. That he did not approve of the word being used, i.e., that he instructed his solicitor as to the whole of the shares, and only approved of the draft upon the supposition that the solicitor had carried out his wishes; 5. That he did not

understand the effect of the words used ; 6. That he intended the nephews to have all the shares.

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Cur. adv. vult. (1)

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March 14. THE PRESIDENT. The findings of the jury have disposed of the whole matter. It appears that the testator intended to leave all his shares in a particular company to his nephews, and gave instructions to that effect to his solicitor, who embodied them in writing and sent them to a conveyancing counsel in London to draw the will. In those instructions the solicitor spoke, as he had been directed by the testator to speak, of "all" the testator's shares ; but, by some accident not accounted for, counsel introduced into the draft will the word "forty" before "shares." Though the solicitor saw this, it never attracted his attention, and he never realized the effect the word "forty" would have on the disposition of the shares made by the testator. The jury have arrived at the conclusion that what the solicitor said on this subject was correct—that he never informed the testator in any way that the word "forty" had been introduced ; and it was proved, by other evidence than that of the solicitor himself, that the actual will as executed was not read over to the testator. The jury found that the testator never authorized the introduction of the word "forty" in the will, and never heard that it had been introduced, and that he executed the will in the belief that it carried out his instructions. In the case of *Harter v. Harter* (2) I held that the language of a will could not be changed where the testator had seen the words and adopted them ; but in *Fulton v. Andrew* (3), where a residuary bequest was introduced into a will without the knowledge and authority of the testator, the clause containing that bequest was rejected. If so, the same principle may be applied to a single word, and therefore, on the ruling of the House of Lords, in *Fulton v. Andrew* (3), I hold that the words may be struck out which had been introduced without the authority of the testator.

The Court directed that the word "forty" be struck out of the

(1) His Lordship postponed judgment in the belief that the same questions were about to be decided in a case then standing for judgment in the

Privy Council. This, however, turned out to be erroneous.

(2) Law Rep. 3 P. & M. 11, 22.

(3) Law Rep. 7 H. L. 448.

1882 four places in which it occurred in the will, and, by consent of
 MORRELL the parties, directed that the costs be paid by the plaintiffs.

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Solicitors for plaintiffs: *Field, Roscoe, & Co.*

Solicitors for defendants: *Sharpe, Parkers, & Co.; Walker, Son, & Field.*

R. A. P.

Feb. 21.

WILLIAMSON *v.* WILLIAMSON AND BATES.

Divorce—Wilful Neglect—Imprisonment for Criminal Offence.

Seemle, that the conviction of a wife for an offence against the criminal law is no justification for refusing further cohabitation with her, and that, if such refusal conduces to her adultery, the Court will not grant her husband a dissolution of his marriage.

THIS was a petition for dissolution of marriage.

The petitioner, James Williamson, a carter, was married in January, 1879, to the respondent, a domestic servant, and a fortnight afterwards she was apprehended and subsequently convicted of theft and sentenced to six months' imprisonment. On her discharge from prison she did not return to cohabitation with her husband but again went into domestic service. While there, and in October, 1879, she asked her husband to live with her again, but he refused owing to her misconduct. He then lost sight of her until November, 1881, when he discovered that she had been living with the co-respondent ever since May, 1880.

Neither the respondent nor co-respondent appeared in the suit.

Searle appeared for the petitioner.

THE PRESIDENT. The conviction and imprisonment of a husband or wife for an offence against the criminal law is no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of felony, such conviction does not in this Court justify him in deserting her. It sometimes happens that wives have husbands who have been convicted of

infamous crimes, and yet those husbands are legally entitled to cohabitation with them.

In this case I have to consider not only whether there was desertion by the husband without legal excuse, but also whether that desertion has tended to bring about her adultery. It appears that after coming out of prison she did not go to her husband, but returned to service, and got a living in the manner she had done before her marriage, and that after his refusal to receive her she again returned to service. I do not think, therefore, that the refusal of the husband to resume cohabitation with the respondent at the time she presented herself to him in October, 1879, can be said to have conduced to her adultery, and therefore I pronounce a decree nisi, with costs.

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Solicitors: *Botterell & Co.*

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GANDY v. GANDY.

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Separation Deed—Covenant not to sue for greater Allowance—Subsequent Adultery—Permanent Alimony.

A deed of separation must be construed in the Divorce Court as an agreement, amongst other things, that the parties shall live apart in chastity.

Such a deed contained a covenant by the wife not to take any proceedings to compel the husband to allow her any larger amount as alimony. He subsequently committed adultery, and she obtained a decree of judicial separation:—

Held, that his subsequent adultery deprived him of the right to have the restraining provisions of the deed enforced.

Reversed on appeal 1881. 52
THIS was a summons to rescind an order made by one of the registrars for permanent alimony. The facts sufficiently appear in the judgment.

Dec. 20, 1881. *Tatham* appeared for the petitioner, and *Middleton* for the respondent.

Cur. adv. vult.

March 21. THE PRESIDENT. This was a suit by a wife for judicial separation on the ground of her husband's adultery.

The respondent pleaded only a denial of the charge. At the trial before me it was proved that the respondent was guilty of

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the adultery alleged in the petition, and I pronounced a decree of judicial separation and gave the custody of the children to the petitioner.

During the pendency of the suit I ordered that alimony should be paid to the petitioner at the rate of 250*l.* per annum.

After the trial the petitioner applied for an order that her husband's means should be ascertained by the registrar, for the purpose of fixing the permanent alimony to which she claims to be entitled.

The respondent opposed this application, on the ground that before and at the time of the institution of the suit the petitioner was living apart from him on the terms of a deed of separation of the 6th of June, 1879, by which he covenanted with trustees during the life of the petitioner to pay for the use of herself and those of her daughters who were living with her the sum of 250*l.* per annum, and the trustees covenanted that the petitioner would not at any time thereafter commence any suit or proceedings to compel the respondent to allow her any further support or alimony. There was also a proviso that the petitioner should not be entitled to the custody of the two youngest children. The adultery which was established against the respondent was committed after the execution of the deed of separation.

The question which I have to determine in substance is whether I am precluded by the existence of the deed of separation from investigating the respondent's actual means, with a view to allotting to the petitioner a larger amount than that named in the deed, or securing that amount to her in some other way than by the deed. It was not suggested that the deed could afford any defence to the suit itself. The petitioner has thus become entitled to a decree of judicial separation, and the Court has acquired the statutory powers which result from the pronouncing of such a decree—for example, to order the custody of the children to be given to the injured parent. In the same way I think that the Court has, notwithstanding the deed, power to allot alimony to the successful party upon the ordinary principles applicable to that subject.

This matter has been under my consideration on previous occasions. It has not been dealt with by the learned judges who

preceded me in this seat. There was no opportunity for them to consider it, and there is not, so far as I am aware, any authority for saying that before the Judicature Act the Divorce Court would have felt itself restrained by the terms of a deed of separation from allowing alimony to the wife to a larger amount, or in some other manner than the deed prescribed, in the event of her obtaining a decree for divorce or separation for a matrimonial offence committed by the husband after the execution of the deed. Had such a question arisen, I presume the Court would have left the husband to enforce his rights, whatever they might be, under the deed in an action against the trustees, or by a suit in equity to restrain the wife from suing for alimony, as was in fact done in the case of *Williams v. Baily*. (1) Practically I have to consider what a Court of Equity would have done in such circumstances, with this qualification, that in suits for judicial separation I am bound by statute to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Court acted and gave relief. And further, that the Judicature Act only enacts that, where there is any conflict between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

The point was discussed but not determined in the case I have mentioned of *Williams v. Baily*. (1) There Wood, V.C., refused to restrain the wife from suing for alimony pendente lite, but made her undertake to deal with any order the Divorce Court might make as to alimony as the Court of Chancery should direct. The Vice-Chancellor intimated that he should have held Mrs. Williams bound by the deed if she had sought to enforce it against her husband, or had unequivocally asserted her rights under it, but he held that the mere acceptance of the benefits reserved to her by the deed, by taking linen, furniture, and wearing apparel and payment of the allowance was not sufficient to induce him to grant an injunction against her proceeding in the Divorce Court for the purpose of obtaining alimony pendente lite. What became of the cause does not appear, but the proceedings for alimony were continued in the Divorce Court, and the Judge Ordinary made an order on the husband to give particulars

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(1) Law Rep. 2 Eq. 731.

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of his income: *Williams v. Williams* (1); so that it would seem that the wife was not restrained, but I do not think that this is an authority from which I can derive much assistance. It is not necessary to review the cases in which it has been held that a party to a deed of separation, whether husband or wife, is bound by the terms of the deed not to institute a matrimonial suit. The whole subject is very fully discussed by the Master of the Rolls in *Besant v. Wood*. (2) That case establishes that where a husband has not "so misconducted himself as to lose his right of specific performance," he may in a Court of Equity enforce a covenant contained in a deed of separation that his wife shall not institute a suit for restitution of conjugal rights. And this would probably apply to covenants not to institute other matrimonial suits.

In *Brown v. Brown* and *Shelton* (3) I had to consider what conduct on the part of a husband would cause him to lose his right of specific performance of such a contract. I may have been wrong, as the Master of the Rolls appears from the report of *Besant v. Wood* (2) to have thought I was, in the conclusion I arrived at in the particular case. But whether right or wrong, my judgment there proceeded upon the ground that the husband had been guilty of misconduct (namely, by bringing an unfounded suit for adultery against his wife), which caused him to lose his right to restrain her from asking for a decree of judicial separation, upon facts which she had proved in answer to his charge of adultery. It would be beside the present question, and I do not desire to enter upon a vindication of every expression used in that judgment, but I had the authority of the Court of Appeal, consisting of Martin, B., and Willes, J., sitting with Sir Cresswell Cresswell, for holding that neither the lapse of time since the parties separated, nor the execution of a deed of separation, was an absolute bar to the wife suing for judicial separation, on the ground of cruelty committed before the date of the deed. And I also had the authority of Lord Penzance in *Williams v. Williams* (1) and other cases for holding that a wife, although she had been living for some time apart from her husband on the

(1) Law Rep. 1 P. & D. 370.

(2) Law Rep. 12 Ch. D. 605.

(3) Law Rep. 3 P. & D. 202.

terms of a deed of separation, might sue for judicial separation in respect of cruelty committed before the date of the deed, although, of course, the deed and the delay must be taken into account in considering whether the wife stands in need of the intervention of the Court.

In the absence of authority upon the point now raised for my determination, I must decide the case in conformity with my own view of the principles which should govern it, and I am obliged to refer to what I have said on former occasions.

In *Benyon v. Benyon and O'Callaghan* (1), after execution of a deed of separation by which the wife allowed her husband 100*l.* per annum, she was guilty of adultery, and the husband obtained a decree dissolving the marriage. I held that he was entitled, notwithstanding the deed, to a variation of the settlement by which he would receive a larger amount than 100*l.* a year out of the wife's income. My observations in that case are mutatis mutandis applicable to the present. I there said at p. 451: "With regard to the second objection as to the deed of separation under which the husband was to have an allowance of 100*l.* per annum, I am of opinion the husband is not precluded by the fact that he accepted such a sum from taking these proceedings. I am in complete ignorance of the circumstances under which that deed was executed, but it is obvious that a husband who for some reason or another has agreed that his wife shall live apart, there being no ground for seeking a dissolution of marriage, may be willing to accept a small sum out of the wife's income rather than expose in public their matrimonial differences. The case is very different, if after a separation of this kind the wife is guilty of conduct which entitles the husband to have the marriage dissolved. He may have been content with a small portion of the wife's income while she retains the character and position of his wife, and at the same time may reasonably object to an adulterer enjoying her property and the income thereof in her society. It would be of evil example and morally dangerous if the wife's pecuniary position could not be altered by reason of her adultery subsequent to her husband's acceptance of an allowance. In this changed condition of things I think the husband is entitled to ask

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for a larger allowance than he agreed to accept at the time of the separation."

The point came before me again in the case of *Morrall v. Morrall*. (1) There the suit was by the wife. After the execution of a deed of separation by which trustees covenanted on behalf of the wife, as in this case, that she should not take any proceedings to compel her husband to allow her anything except the sum covenanted by the deed to be paid to her, the husband was guilty of incestuous adultery, and a decree of dissolution of the marriage was pronounced. I held that the wife was entitled to an allowance based on the husband's actual income.

It was argued that these cases are not applicable, because in each of them the marriage of the parties was dissolved, and thus a change of their status was effected. But if the reasons on which my judgment in those cases rests are well founded, I am of opinion that they are equally applicable where the wife has become entitled to a decree of judicial separation. The decree of dissolution does not in itself put an end to the deed. But I held in *Morrall v. Morrall* (1) that the deed was executed on the basis of the facts which existed at its date, and that the subsequent adultery of the respondent created a different state of facts, which was not in contemplation of the parties when entering into the deed, and that therefore the petitioner was no longer bound by it. Or, if another way of putting the case be preferred, I held that subsequent adultery of the respondent was such misconduct as deprived him of the right to have the restraining provisions of the deed enforced. After much consideration, I remain of opinion that to adopt the opposite conclusion would not only be to make the general words of the contract extend to a state of things not in the contemplation of the parties, but would lead to results in a high degree prejudicial to morality, it would be in effect to hold that a husband who has entered into an agreement with his wife to live apart, making her a certain allowance, obtains thereby a license to commit adultery for the rest of his life without subjecting himself to any liabilities beyond those imposed by the deed.

It appears to me that in all cases such as this it is implied in the contract contained in the deed that it has reference only to

(1) 6 P. D. 98.

the parties living separated, without more, and not to their living apart in a state of adultery.

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It has been held that an ordinary deed of separation such as this does not amount to a license to commit future adultery: *Sullivan v. Sullivan* (1); and where the deed does in fact give such a license it amounts to connivance and would be a complete bar to the suit: *Thomas v. Thomas*. (2) A deed of separation like the present must therefore be construed in this Court as an agreement that the parties shall live apart in chastity. I cannot think that if such had been the language of the deed a Court of equity would have restrained a wife from taking proceedings for alimony upon facts like the present. An injunction to restrain legal proceedings was formerly granted on the sole ground that it was against conscience that the party inhibited should proceed in the cause. If I am right that the deed contemplates that the parties will live in chastity, it cannot be said that it is against conscience that the wife should insist that as her husband has violated an implied condition of the bargain she should not be restrained from asserting her rights independently of it.

It was further argued that in the present case the wife obtained by the deed a provision for her life, and that the Court would only give her alimony during the joint lives of herself and her husband. In cases of judicial separation, the Court has power by s. 17 to make any order for alimony which shall be deemed just. But assuming that the Court has not the power, or were not disposed to secure an annual sum to the wife for her life, this would not affect the present question whether the husband can be required during his life to pay a larger sum than 250*l.* per annum or secure the wife's allowance otherwise than by the deed. The wife may be put to her election which of the two provisions she will accept, or a difference may be made in the amount to be paid to her during her husband's life if any payment should remain secured to her after his death. These are questions which will be dealt with when the amount and nature of the husband's means have been ascertained.

For these reasons I am of opinion that the inquiry as to the respondent's means should proceed.

(1) 2 Ad. Ecc. 303.

(2) 2 Sw. & Tr. 113.

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Some doubts were raised at the hearing as to the form of the proceedings, but it was agreed by counsel that in the event of my decision being in favour of the wife she should be at liberty to file her petition for permanent alimony, and that the respondent should be at liberty, if so advised, to appeal at once from this order.

Solicitors for petitioner : *W. & A. Ford.*

Solicitors for respondent : *Gregory, Rowcliffes, & Co.*

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SMITH v. SMITH, MAJOR, CHILD AND RABETT.

Divorce—Respondent's Costs—Full Costs.

In a divorce suit the usual order had been obtained for securing the wife's costs of the hearing, and there had been no appeal from that order and no further costs were asked for at the hearing. Subsequently the case of *Robertson v. Robertson* (6 P. D. 119) was decided in the Court of Appeal, and the Divorce Court was thereupon asked to order payment of the wife's full costs. Application refused.

In future, if in a divorce suit in which a wife is found guilty the Court is asked to order payment of her full costs, the Court will postpone its decision until after her bill of costs has been taxed.

The case of *Robertson v. Robertson* (6 P. D. 119) referred to.

THIS was a husband's petition for dissolution of marriage, by reason of his wife's adultery with the co-respondents. The respondent in her answer denied the adultery, and made counter-charges of cruelty, adultery, and connivance.

The cause was heard in the first instance against the respondent and the co-respondent Child before the Court and a special jury, when the jury after a two days' trial found, on the 3rd of March, 1881, that the petitioner was not guilty of any of the counter-charges, but they were unable to agree as to the charge against the respondent and co-respondent.

The cause was again heard on the 5th and 6th of July following, when evidence was given against all the co-respondents, and the jury found that the respondent had committed adultery with each of them, and the Court pronounced a decree nisi with costs

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against the co-respondents, and made the usual order for the wife's costs.

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March 28. *Dr. Swabey*, for the respondent, applied for an order for payment of the respondent's full costs. In *Robertson v. Robertson* (1) the Court of Appeal has decided that, unless the solicitor has improperly conducted the action, the wife's costs are to be taxed and paid without reference to the sum paid into Court or secured. The jury in this case were discharged on the first trial and therefore there can be no doubt that the solicitor was right in defending the wife upon the second hearing. The wife had to be defended against charges of adultery with three co-respondents, but the registrar had only ordered the sum of £40 to be paid in to meet her costs.

Searle, for the petitioner. This case was decided before *Robertson v. Robertson*. (1) That was heard on the 19th of July and is not retrospective. Besides, the application is too late. It ought to have been made when all the facts were fresh in the recollection of the Court: *Wait v. Wait and Flower*. (2) Even if the Court has now a discretion in the matter the application ought not to be granted, as the respondent greatly increased the costs of the suit by making counter-charges for which there was no foundation.

Dr. Swabey, in reply.

Cur. adv. vult.

April 26. THE PRESIDENT. This is the first occasion since the case of *Robertson v. Robertson* (1) was decided by the Lords Justices of Appeal on which I have been called upon to consider the effect of their judgment on the practice of this Court. The question involved is one of considerable importance, as it affects the exercise of my discretion as to costs in a very large number of the matrimonial causes which are tried before me. In *Robertson v. Robertson* (1) I refused to allow the wife, who was found guilty of adultery and failed to prove any charge against her husband, more than 370*l.* for her costs, for which amount security had been given. The Court of Appeal held that I ought to have

(1) 6 P. D. 119.

(2) Law Rep. 2 P. & D. 228.

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allowed her her full costs whatever they might on taxation be found to be. My power as to the costs is conferred by the 51st section of 20 & 21 Vict. c. 85, which enacts that "the Court may make such order as to costs as to such Court may seem just." I am, of course, aware that this discretionary power must be exercised, not arbitrarily or capriciously, but judicially. If the Court of Appeal had felt itself in a position to overrule the exercise of my discretion in the particular case, I should have accepted its correction without observation, but the Master of the Rolls says (p. 123):—"The learned judge did not exercise any discretion at all; he simply made the usual order as to costs—an order which had become usual in the way I have mentioned. Therefore, it is not a case where the appeal is as to the exercise of discretion, but a case where the Judge, conceiving himself bound by a rule of practice, which we think erroneous, simply followed that rule." I assume from these observations that the learned judge was not in possession of the facts of the case. I certainly did not conceive myself to be fettered by the practice in the exercise of my discretion, and I was under the impression that I had exercised it. If I had thought it just that the wife should have more than 370*l.* for her costs, there was nothing in the practice to prevent my giving more to her. The facts as they appear on the minutes of the Court were these:—Security was originally given by the husband for 150*l.* Ten days before the trial application was made by the wife to increase this sum, on account of the expense of bringing witnesses from Italy, and the amount was accordingly increased to 370*l.* The trial took place on three days; on the second of these days a summons was taken out to further increase the amount. This summons was brought on for hearing in open court. I find on reference to the shorthand writer's notes that I said:—"I must have some further explanation. We are now in the middle of the case. It was always known that the adultery was charged to have been committed in Italy; and it appears from the evidence given to-day that it was known that there was a charge with reference to Bergamo. I must, therefore, see how anything in the course of the case has made it necessary to call further witnesses from Italy. It was always known that Favogrossa was charged as co-respondent. It must, therefore, have

been taken into account when the costs were estimated." I accordingly reserved the question till after the hearing, and subsequently heard the summons in Chambers and refused the application, on special grounds affecting the solicitor as well as the respondent. I do not now enter into my reasons, as they would be irrelevant on this occasion; and my object is not to justify the exercise of my discretion, but to shew that I did in fact exercise it in the fullest way in which that duty can be discharged by a judge.

I now proceed to trace the origin and growth of the practice of the Divorce Court as to a wife's costs. I do not think it necessary to say much as to what the Master of the Rolls terms "the nobler view" which prevailed in the practice of the House of Lords on bills for divorce. It is matter of legal history that the expenses of proceedings before that tribunal were so large that they amounted to a denial of justice to all but the very wealthy, and it was to remedy this evil that the Divorce Court was established. In the Ecclesiastical Courts the wife was entitled to have her costs taxed *de die in diem*, so as to enable her to defend herself; but if her proctor neglected to take this precaution it was the invariable practice of the Court not to make any order for costs in favour of a wife who had brought her case to a hearing and had failed. This question was in 1858 brought to the consideration of the Full Court, the then Court of Appeal, consisting of Lord Chelmsford, Wightman, J., and Sir C. Cresswell, in *Keats v. Keats and Montezuma*. (1) On an application for the wife's costs, the Court said, "You are too late for that now. Your application should have been made before the cause was heard. The foundation of the rule of the Ecclesiastical Court was that the wife should be enabled to bring her case to a hearing and defend herself, and so up to any time previous to the hearing the husband was generally liable to have the wife's costs taxed against him, and the Court has so far followed the rule, as in *Evans v. Evans and Robinson* (2), *but if the wife has brought her case to a hearing, howsoever, and fails, the husband has never then been made liable for her costs.*" Sir C. Cresswell had at the time of the case referred

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(1) 1 Sw. & Tr. 358.

(2) 1 Sw. & Tr. 328.

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to, of *Evans v. Evans*, established the practice of directing security to be given for the wife's costs, out of which her solicitor was entitled, if the Court so ordered, to have his costs. And this was the practice while Sir C. Cresswell presided over this Court. The Master of the Rolls says (1):—"I must say, in fairness to Sir James Hannen, that this practice did not begin with him, and that he merely followed the practice of his immediate predecessor, who followed the practice of Sir C. Cresswell." It has been seen that the practice of the Ecclesiastical Court as adapted by Sir C. Cresswell to the Divorce Court was expressly sanctioned by the Full Court; but Lord Penzance did not merely adopt the practice established by Sir C. Cresswell, he modified and embodied it in a rule of Court made under the authority of the Act of Parliament. The rule is as follows:—(Rules and Orders, Dec. 26, 1865, No. 159). "When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for and ordered to be allowed by the Judge Ordinary at the time of such hearing or trial." I had power, if I had thought fit, to alter this rule; but so far from my experience of its working leading me to think it objectionable, I, so to speak, re-enacted it by the amended rules of the 14th of July, 1875. Before examining what interpretation the Lords Justices have put upon the 159th rule, I wish to state what the operation of that rule has been. In a vast majority of divorce cases the parties are poor. It is, of course, essential to justice that the wife should be provided with the means of having the charge against her fully investigated, whether she be guilty or not; but it is of scarcely less importance that the husband should not be called upon to pay or secure more costs than are really necessary for this purpose. It frequently happens that the proceedings are stayed because the husband cannot pay or secure the required amount, and by this and other means the proceedings are delayed as much as possible with the result, if not with the object, that the husband has to pay alimony to his wife for as long a period

(1) At p. 121.

as practicable. When at length he is able to bring the case to trial it is a common occurrence for the counsel who represents the wife candidly to say that, as he is not in a position to call his client to deny the charge, he will not take up time by contesting the case. It is obvious that in such cases the respondent has known from the beginning that she had no defence, yet she has put her husband to great and unjustifiable costs and expenses. That she has had sufficient means to bring her case to that stage is plain, *res ipsa loquitur*. Is it unreasonable to say that she shall have no more unless she satisfies the judge at the trial that more was necessary? I am aware that this question is not one solely between husband and wife, but involves also the interests of her solicitor; and I have expressed in *Flower v. Flower* (1) as strongly as I could my opinion of the necessity of making sufficient provision for his remuneration. It would be impossible to ascertain in what cases the solicitor has become aware that his client was guilty; or at what stage of the proceedings he may have acquired that knowledge. Nor do I think that a solicitor, as soon as he discovers that the wife cannot deny the charge made against her, is bound to abandon her. If he did so, it would cause her to seek the assistance of some less scrupulous adviser. There is an honourable way of defending the worst of cases. But all inducement to economy in the conducting of the wife's defence will be removed, if the costs of the wife are to be allowed in every case in precisely the same way, whether she be guilty or not, without any limitation beyond ordinary taxation for the protection of the husband. The limitation afforded by the 159th rule and the practice as to giving security is intended to strike a fair balance between the interests of the husband and the wife's solicitor, and it operates in this manner. The solicitor gets actual payment of all costs until the directions are given as to the mode of hearing or trial. He then states to the registrar what witnesses he proposes to summon, and all the circumstances which may enable the registrar to fix the amount of costs required for the hearing. If the solicitor is dissatisfied with the Registrar's order he may appeal to the judge. If the circumstances of the case make it

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(1) 9 T. D. 134.

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reasonable, I frequently allow the case to proceed, reserving to the wife's solicitor the right to have his costs taxed, and to apply for an order for their allowance at or after the trial as though security had been given. If unexpected incidents are alleged to have arisen, application may be made to increase the amount to be secured, as was done in *Robertson v. Robertson*, and at the trial the solicitor has the opportunity under rule 159 to shew cause why costs beyond the sum secured should be allowed. Nor do the safeguards for the solicitor end here, for Lord Penzance held in *Somerville v. Somerville* (1) that even after the trial an application on special grounds with reference to the wife's costs may be entertained. Can it be said that the protection of the solicitor is not thus amply provided for? He is, in fact, the most favoured of practitioners, for he can, whatever the merits of his case be, stay his adversary's proceedings until all the costs which he may shew can be reasonably anticipated have been paid or secured. If the solicitor does not take the necessary steps to obtain sufficient security or an order of the Court for his costs it is his own fault. Numerous instances might be cited in the practice of all Courts where costs are lost if not asked for at the proper time. If, on the other hand, a general order for all the solicitor's costs is in every case to be made, the costs of witnesses may have to be allowed who were not mentioned when the security was fixed, and who were not called at the trial. It may be impossible for the taxing officer to say that their evidence was irrelevant. It would not be expedient or possible to make the costs of witnesses depend on whether they or the respondent were put into the witness-box. Such a course would tend to discourage that honourable candour of counsel to which I have referred, and would supply a motive for perjury and the prolongation of hopeless defences. Further, it is impossible for the registrar, who has not heard the case, to know to what extent unnecessary costs have been incurred. It is only the judge, who has heard the witnesses and seen the course the trial has taken, who can form an opinion on this subject; and the 159th rule only aims at this—that the wife's solicitor shall at the

(1) 36 L. J. (P. & M.) 87.

trial, while the circumstances are fresh in the recollection of the judge, shew the facts which he alleges justified him in exceeding the costs already provided for.

I assume that, when the Lords Justices say that they have power to overrule the practice of the Divorce Court, they mean, not that they have power to abrogate a rule made under the authority of an Act of Parliament but, that they put a particular interpretation upon it; and I now proceed to ascertain what interpretation they have put on the 159th rule. The Master of the Rolls says: "The 159th rule is plain. 'No costs shall be allowed except such as shall be applied for and ordered by the judge at the time of the hearing.' That, of course, means ordered to be allowed in the exercise of a judicial discretion, and it appears to me that there not being a suggestion that the solicitor of the wife has conducted himself otherwise than properly, or that he had not fair grounds for believing that the wife had a defence against the charge of adultery, he ought to be allowed the usual costs." It is to be observed that the Master of the Rolls did not apply this principle to the costs of the appeal either in *Robertson v. Robertson* (1), or *McAlpin v. McAlpin*. (2) In each of these cases the wife's appeal was partially successful. It cannot, therefore, be said that the solicitors in these cases acted otherwise than properly, or that they had not fair ground for bringing the appeal; yet the wife's costs of the appeal were in both cases refused. Brett, L.J., says (p. 125), "If the solicitor who appears for the wife either knowingly promotes a case which it must be clear to anybody has no foundation at all, so that he is countenancing improper litigation, or if he takes steps which are merely oppressive or obviously unnecessary, or if he crowds a case with absurd evidence, all these are reasons why, if he so misconducts himself, the costs of the wife should be disallowed either in whole or in part." Cotton, L.J., says (p. 126) the 159th rule "gives a discretion to the judge in this way—that where there are certain steps taken improperly by those who are acting for the wife, witnesses called who ought not to have been called, and so on, those are costs which in his discretion he may disallow."

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(1) 6 P. D. 119.

(2) Not reported.

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The result of these passages seems to be that the Lords Justices consider that, on the true construction of rule 159, the wife is not bound at the trial to shew why she should be allowed more than the sum which on her own solicitor's statement of the facts the registrar deemed sufficient, but the husband is to shew cause why she should not be allowed all that she may claim. This cannot be done at the trial, for the husband does not then know what the wife's claim will be, nor can it be effectually done before the registrar, for he does not know the judge's view of the necessity for the additional costs claimed. The judge himself must, therefore, if required to do so, consider the propriety of the wife's bill of costs when brought in. This is the course which I have proposed to take in every case which has arisen since the decision of the Court of Appeal in *Robertson v. Robertson*. (1) Thus the consideration of the justice of the wife's claim to increased costs is unavoidably postponed from the trial till some time after. It must be left for future experience to determine whether this will render necessary some change in the rules.

In the present case, however, I do not see how the respondent can invoke the aid of the decision of the Court of Appeal in *Robertson v. Robertson*. (1) That case had not been decided when I made the order now complained of. I was not asked at the hearing for an order for any costs beyond the amount for which security had been given. There had been no appeal from the registrar's order and no application to increase the amount to be secured. Had I been asked at the trial to give her a larger amount, I should have considered the application, having regard to all the circumstances of the case. Even after the hearing I should, in conformity with the decision of Lord Penzance in *Somerville v. Somerville and Webb* (2), have entertained any application on special grounds for an order to increase the wife's costs. But eight months were allowed to pass, and in the meantime the decree nisi has been made absolute. I consider that I have now no more power to alter my order in this case than to do so in every one of the very numerous cases in which I have made similar orders during the last ten years. The Court has not authority, after a case is concluded, to recall an order, however erroneous, which

(1) 6 P. D. 119.

(2) 36 L. J. (P. & M.) 87.

correctly expressed the judge's meaning at the time: *In re St. Nazaire*. (1) I must therefore refuse this application. I was asked, in the event of my decision being as it is, to give leave to appeal, but it would seem that the respondent does not need my leave. I was not asked to give leave to appeal in *Robertson v. Robertson* (2) or in *M'Alpin v. M'Alpin* (3), another case in which for special reasons I refused on summons heard after the trial to allow the wife's costs beyond the amount secured; and in so far as this is a question of costs only I doubt whether I have the power to give leave to appeal. By the Matrimonial Causes Act no appeal is allowed on the subject of costs only, and although the Appellate Tribunal is now changed, the law relating to the Divorce Court remains unaltered. The rules made under the Judicature Acts do not affect the practice or procedure in matrimonial causes. However, as I do not desire to throw any obstacle in the way of an appeal, I will say, if it be necessary, and so far as I have power to do so, I grant leave to appeal. (4)

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Solicitor for petitioner: *T. E. Watkin*.

Solicitors for respondent: *C. O. Humphreys & Sons*.

(1) 12 Ch. D. 88.

(2) 6 P. D. 119.

(3) Not reported.

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(4) Hold by Ct of Appl that will leave appeal not to be for costs SC WM 52/1/100

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Feb. 22.

[PRIVY COUNCIL.*]

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

MARTIN, APPELLANT; MACKONOCHIE, RESPONDENT.

Ecclesiastical Offences—Appropriate Sentence obligatory on the Court—Court of Final Appeal will not decide in the first instance—Contumacy—New Suit for fresh Offences whilst Sentence in a former Suit is not enforced.

8 PD 193 A Judge has no discretion, while finding a defendant guilty of ecclesiastical offences, to absolve him from all ecclesiastical censure or punishment for those offences, but should pronounce that which he considers to be an appropriate sentence.

Case remitted to the Court below for that purpose as, except under peculiar circumstances, a Court of final appeal ought not to decide any cause in the first instance.

Although it may not be proper to institute a new suit for the mere purpose of punishing contumacy or disobedience to orders passed in a former suit, yet a new suit may be brought for new substantial offences, and the former disobedience be relied upon as a matter of aggravation. An order having the force of a definitive sentence may inflict canonical punishment (such as deprivation, degradation, and excommunication) which cannot lawfully be inflicted for mere contumacy or contempt.

THIS was an appeal from a decree of the Judge of the Court of Arches, Lord Penzance (June 5, 1880), which decreed that the promoter had sufficiently proved the contents of the articles as to which evidence had been given, but did not decree that the respondent had offended against the laws ecclesiastical, and refused to decree that the respondent be deprived of his ecclesiastical preferment, or that he be otherwise duly and conveniently punished, but did condemn him in costs. The case and the judgment of Lord Penzance are reported in Law Rep. 6 P. D. 87.

Dr. Deane, Q.C., and *Jeune (Moore with them)*, for the appellant. The judge ought, upon his findings on the evidence, to have decreed that the respondent had offended against the laws

* *Present* :—THE LORD PRESIDENT, THE LORD CHANCELLOR (LORD SELBORNE), THE ARCHBISHOP OF YORK, LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT COLLIER, and SIR JAMES HANNEN. Ecclesiastical Assessors: THE BISHOP OF DURHAM, THE BISHOP OF WINCHESTER, and THE BISHOP OF LICHFIELD.

ecclesiastical, and be deprived of his ecclesiastical promotions within the province of Canterbury, and be otherwise canonically punished. Deprivation is legally and properly assignable to the offences proved in this suit and aggravated by disobedience to former monitions: see *Combe v. De la Bere* (1), where every authority is cited; *Caudrey's Case* (2); No. 79 in the report of cases before the delegates in Mr. Rothery's returns; *Pullen v. Clewer* (3); *Sanders v. Head*. (4) Although the promoter could have asked in the former suit for a writ of significavit, he had at least an equal right to prefer a fresh suit for fresh offences, and ask for a final sentence. The difference is, that upon a summary proceeding a sentence of deprivation cannot be obtained, that is without writ and exhibition of articles. [Reference was then made to *Hebbert v. Purchas* (5), where at page 312, "on a motion" ought to be "or amotion"; *Martin v. Mackonochie*. (6)] It is not accurate to say that the first suit was abandoned, on the contrary, the present suit is to punish the violation of the sentence of suspension. If any one but Martin had instituted this suit, the question on which Lord Penzance decided the case could not have arisen, and it was no more incompetent for Martin to bring a fresh suit than for a stranger.

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[SIR JAMES HANNEN. Lord Penzance does not rule against the competency to bring a fresh suit.

LORD BLACKBURN. Lord Penzance seems to have refused to come to a judicial determination at all.]

With regard to that it is submitted that Lord Penzance had no discretion. The respondent had not pleaded the former suit as a bar, and even if the former sentence had been executed a fresh suit would lie for fresh offences. The promoter was entitled to a judicial determination as to what the sentence should be.

Assuming that there was a discretion to refuse to pronounce sentence, Lord Penzance's reasons for exercising it were insufficient. He did not shew that Martin was bound to proceed with

(1) 6 P. D. 157, 169.

(2) 5 Co. p. 1.

(3) 1 Hagg. Eccl. Rep. Appendix following p. 353; p. 2 of Appendix B.

(4) 3 Curteis, 565, 602.

(5) Law Rep. 4 P. C. 301, 312.

(6) Law Rep. 3 P. C. 479. 61

1882 the former suit, to disregard fresh offences, and fall back on the
decree of suspension.
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in a suit can he be replaced?]
Yes, see Rothery's Returns, No. 67.

The respondent did not appear.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Lord Selborne):—

The suit out of which this appeal arises was instituted under the Church Discipline Act (3 & 4 Vict. c. 86), by letters of request from the Lord Bishop of London to the Court of Arches, on the 6th of January, 1880. In it the respondent, a beneficed clergyman of the diocese of London, was charged with eight several unlawful acts, specified in the articles as having been committed on two distinct occasions, in the performance of divine service in his church, within the two years last preceding, all which acts had been previously determined to be illegal, either by the Court of Arches, or by her Majesty in Council, on appeal from that Court.

There had been two previous suits in the Court of Arches against the same defendant, both promoted by Mr. Martin, who is also the promoter of this suit. In the earlier of them a sentence was pronounced by Sir Robert Phillimore, then Dean of Arches, on the 28th of March, 1868, by which the respondent was found to have offended against the ecclesiastical law in two out of four points then charged against him, and was admonished to abstain for the future from the like acts. On the two charges to which this sentence of Sir R. Phillimore did not extend, the promoter appealed to her Majesty in Council, and her Majesty in Council, by the advice of the Judicial Committee (23rd of December, 1868), amended the sentence, declaring the respondent to have offended against the law in those points also, and directing him to be admonished against the repetition, for the future, of those offences.

The respondent, having disobeyed (on one point) the monition issued against him in that suit pursuant to the order of her

Majesty in Council, was, by an order of the Judicial Committee, dated the 4th of December, 1869, further admonished to abstain for the future from any such act of disobedience ; and, on the 25th of November, 1870, their Lordships, finding him to have repeated the same offence, and also to have disobeyed the monition issued by Sir Robert Phillimore on another point (which had not been the subject of appeal), suspended him, *ab officio et beneficio*, for three months. That suspension expired on the 25th of February, 1871 ; and (for anything that appears in the present suit) the orders, both of Sir Robert Phillimore in 1868, and of her Majesty in Council, may have been afterwards obeyed by the respondent during the interval between February, 1871, and November, 1879. No further proceeding in that first suit was taken, either in the Court of Arches or before the Judicial Committee. Of the offences charged against the respondent in the present suit, the four first are acts of the same kind with those which had been in question in that suit.

The second suit was instituted by letters of request from the Bishop of London, on the 1st of June, 1874. The offences charged in it did not include any of those four which had been in question in the first, and which are also charged in the present suit. They included all the others now in question. By the decree made at the hearing by Sir Robert Phillimore, on the 7th of December, 1874, all those charges were declared to be established, and the respondent was suspended *ab officio* for six weeks, and was admonished to abstain from like practices for the future. On the 23rd of March, 1878, the present judge of the Court of Arches declared that the respondent had disobeyed Sir Robert Phillimore's monition in certain particulars, and granted a further monition against him. On the 1st of June, 1878, he was suspended, *ab officio et beneficio*, for three years, for continued disobedience. That suspension was in force when the present suit was instituted. It is alleged, by the articles in the present suit, that the respondent, nevertheless, did not desist from officiating in his church, and that, of the offences now charged, some were committed on the day on which that decree of suspension was published, and others on the Sunday afterwards. No proceeding was taken by the appellant to put in force against the

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MACKONOGHIE. respondent, in either of the former suits, the penalties for contumacy and contempt provided, in lieu of excommunication, by 53 Geo. 3, c. 127.

The present suit prayed for a sentence of deprivation, or other canonical punishment, against the respondent. At the hearing before Lord Penzance, on the 5th of June, 1880, his Lordship pronounced a decree by which he found all the contents of the articles sufficiently proved, except three which had been abandoned, and condemned the respondent in costs; but he at the same time "refused" the prayer that the respondent should be deprived of his ecclesiastical promotions within the province of Canterbury, or might be otherwise duly and canonically punished.

The reasons for this judgment stated by his Lordship were, that in the second of the two former suits the promoter had taken no step to enforce the orders made by the Court; and after obtaining from the Court a decree sufficient to put a stop to the practices of which he complained, had abandoned it, and asked for a fresh remedy; that the Court had a "discretion in the passing of all such sentences," and that it would not be consistent with the due maintenance of its authority to pass a sentence of correction, and while that sentence was still subsisting, to pass a second sentence "directed to the same end, without any allusion to the first, or any attempt to punish its non-observance."

It may be observed that the learned Judge did not, in giving these reasons, expressly refer to any charges except those as to which orders had been made in the second suit. But his lordship may probably have considered the same principle to be applicable to the other charges also, as practices similar to those alleged in them had been the subject of monitions in the first suit.

From this judgment, and from the reasons assigned for it, their Lordships find themselves compelled to dissent. They do not think that it can have been the intention of the learned Judge to affirm the existence, generally, of a discretion in an Ecclesiastical Court to refuse by decree to pass any sentence of canonical censure or punishment upon a clerk in holy orders, found by the same decree (in a suit duly instituted and prosecuted) to have been guilty of offences against the law, properly charged.

It is, no doubt, within the discretion of the Judge (whether subject or not to appeal), to inflict a censure or punishment, more or less lenient or severe, according to his judgment of all the circumstances of the case. But their Lordships think, that the Judge has no discretion, while finding the defendant guilty of ecclesiastical offences, to absolve him from all ecclesiastical censure or punishment for those offences.

If the promoter in the present suit had been any other person than Mr. Martin (who was also the promoter in the former suits), their Lordships cannot doubt that the learned Dean of Arches would have acted on this view of his duty. The offences charged in this suit are all new and substantive offences against the law ecclesiastical, not coming within the principle, "*nemo debet bis vexari pro eâdem causâ.*" That principle would have been applicable if these acts had been the identical acts which had been adjudicated upon and punished in the former suits, or in either of them; but it is not applicable, merely because they are repeated offences, of the same description with those so adjudicated upon and punished. It may be, that each of those acts might have been treated, in a proceeding for contempt in one or other of the former suits, as an instance of such contempt; and might, in that way, have been visited with any punishment due to persons disobeying orders of the Court. The judgment of the House of Lords in *Mackonochie v. Lord Penzance* (1) has conclusively settled that it is not an excess of ecclesiastical jurisdiction so to treat acts contrary to monitions of the Court, although they may also be substantive offences against ecclesiastical law; and that, for this purpose, a new suit under the Church Discipline Act is not necessary. It may also be that it would not be proper to institute a second suit for the mere purpose of punishing contumacy or disobedience as such. That question is not now before their Lordships; but, assuming that to be the law, it can have no application, when the new suit is for new and substantive offences.

The disobedience of the respondent to the previous orders is now before the Court (having regard to the abandonment of certain articles) not as a substantive offence, but only as matter

(1) 6 App. Cas. 424.

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of aggravation; in which point of view the case of *Pullen v. Clewer* (1) seems to shew that it may be not immaterial.

Contempt or contumacy, in another suit, cannot deprive the bishop, or a promoter who satisfies the bishop that there is reason for proceeding in respect of new offences by a new suit, of the remedies given by the Church Discipline Act. If the promoter were a different person, the offender could not plead by way of defence his own contempt in a former suit, or the unwillingness of the promoter in that suit to imprison him for it. When the promoter is the same person the new suit is not his only, but is also (in more than a merely formal sense) that of the bishop, whose consent was necessary to its institution. Unless it can be shewn that either the bishop or the promoter is open to some personal exception recognised by law, because he has not thought proper to enforce the penalties of contempt in a former suit, or that the whole objects of the new suit are substantially comprehended and necessarily attainable by means of proper proceedings in the former suit, their Lordships think that the identity of the promoter in both suits ought to make no difference, so far as concerns the question now under appeal. At the most it is one of those circumstances which it may be open to the learned judge to consider, when determining what censure or punishment to inflict.

Their Lordships do not find that any obligation is cast by law upon the promoter of a suit in an Ecclesiastical Court to take proceedings for the imprisonment of a party guilty of contempt. In the present case it appears to them to be by no means impossible (consistently with what was determined by the House of Lords in *Mackonochie v. Lord Penzance* (2)) that an application to the Court of Arches or to the Judicial Committee to make a declaration of contumacy, and issue a significavit against the respondent, grounded on the monitions of 1868 and 1869, might have been unsuccessful; the acts which are the subject of the four first charges in the present suit having taken place nearly ten years after the latest of those monitions. Whether this be so or not, the sentence of deprivation which is asked for in the present suit,

(1) 1 Hagg. Eccl. Rep. App. B, following p. 353.

(2) 6 App. Cas. 424.

seems clearly to be one which, in a proper case, might be pronounced at the hearing of such a suit: *Caudrey's Case* (1) and *Pullen v. Clewer* (2); and it does not appear that there is any precedent for the infliction of that penalty for mere contumacy or contempt. In *Hebbert v. Purchas* (3) such precedents were searched for in vain; and Lord Hatherley, delivering the judgment of the Judicial Committee, said, "Without pausing to inquire whether by any substantive proceeding founded on the ecclesiastical offence of disobedience to the Order in Council that has been already pronounced, a sentence of deprivation or amotion might have been obtained, we are of opinion that we cannot proceed to enforce compliance with the order which has been disobeyed by any summary process of contempt, through the medium of amotion." (In the print of this passage, the sense is obscured by substituting "a motion" for "amotion.")

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It is further to be observed that, besides deprivation, there are other canonical punishments (degradation and excommunication) which might be inflicted in a proper case by an order having the force of a definitive sentence, but which could not lawfully be inflicted for mere contumacy or contempt.

It remains to be considered what order their Lordships ought now to advise her Majesty to make. They have been asked to retain the suit, and to advise her Majesty to pronounce against the respondent an immediate sentence of deprivation. But it was for the learned Judge in the Court below to determine what particular censure or punishment would be most proper under all the circumstances of this case, and to that question (for the reasons appearing in his judgment) the mind of the learned Judge was not addressed. Notwithstanding what is there said as to "a second sentence of suspension" being "out of the question," their Lordships cannot assume it to be impossible that such a sentence might be pronounced if the learned Judge thought it sufficient. If, on the case as it now stands, a more severe penalty should appear to him to be called for, he might still give the respondent (who has hitherto not thought fit to appear in this suit) one more

(1) 5 Co. p. 1.

(2) 1 Hagg. Eccl. Rep. App. B, following p. 353.

(3) Law Rep. 4 P. C. 312.

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opportunity of being heard against such a sentence, and of submitting himself to the Court and the law.

The decree under appeal, although not interlocutory in form, is not, in substance, a decision upon the question in the cause. Their Lordships think that it comes within the principle (stated by Lord Campbell when delivering the judgment in *Head v. Sanders* (1)) that, "except under peculiar circumstances, a Court of final appeal ought not to decide any cause in the first instance, as it ought to have the benefit of the discussion and judgment in the Court below, and there ought not to be an original judgment pronounced from which there is no appeal."

Their Lordships will, therefore humbly advise her Majesty to reverse the sentence of the 5th of June, 1880, so far as relates to the matter complained of by this appeal; and to remit the cause to the Court below to decree against the respondent such lawful and canonical censure or punishment as to the Court shall seem best.

Proctors for appellant: *Moore & Currey.*

H. C.

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[1949] P. 434

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IN RE GOODS OF MARY GUNSTAN.

Dicta of JESSEL, M.R., BRETT and
HOLKER, L.JJ., at pp. 107, 113, 116,
applied. *Re* GIBSON (*dec'd.*). [1949]
2 All E.R. 90.

BLAKE v. BLAKE.

[1881 G. 1005.]

*Will—Acknowledgment of Signature—Testator's Signature not seen by Attesting
Witnesses—Wills Act, 1837 (1 Vict. c. 26), s. 9.*

96BD.141

To constitute a sufficient acknowledgment, within s. 9 of the Wills Act, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper.

Hudson v. Parker (1 Robert. 14) followed.

Gwillim v. Gwillim (3 Sw. & Tr. 200) and *Becket v. Howe* (Law Rep. 2 P. D. 1) disapproved.

THIS was an action commenced in the Probate Division by Henry Blake, claiming probate in solemn form of a document

(1) 4 Moo. P. C. 197.

alleged to be the last will of Mary Gunstan deceased, dated the 12th of August, 1880, whereof he had been appointed executor. Mary Gunstan died on the 14th of March, 1881.

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The document propounded as a will by the plaintiff was executed and attested as follows:—

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“Signed by me in the presence of the under-
signed, who in my presence and in presence of
each other, at same time, signed their names as
witnesses.

“Mary Gunstan,

“Holdernes House, Brixton Road.

“Ann Harradine,

“Holdernes House, Brixton Road.

“Susan Harradine,

“Arrington, Cambridgeshire.”

On being taken to the Probate Office certain erasures were observed, and the attesting witnesses being required by the registrar to make an affidavit as to the time such erasures were made they were unable to do so, or to say whether they had in fact seen the testatrix sign. The registrar thereupon refused probate in common form, and the present action was in consequence instituted.

It appeared from the evidence on the trial before the president that the testatrix, who was a widow lady of admitted capacity, had consulted a friend, formerly a clerk in the Probate Office, as to making her will, and that he had given her written directions as to the form in which a will should be drawn and executed—he had also sketched out the form of attestation clause which she had copied out at the foot of her will.

It appeared from the evidence of Ann Harradine (servant of the testatrix) given at the trial, and from the deposition of Susan Harradine (aunt of Ann Harradine), which was read at the trial, that neither of the witnesses saw the testatrix sign her name—that on their entering the room whither they had been summoned by the testatrix she was laying down her pen—that neither of them knew what they were wanted for, or that the document on which they were writing their names was a will, Ann Harradine remarking that “if she had known she would have taken more notice.”

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According to Ann Harradine, the testatrix said : "This is a little whim of mine." According to Susan Harradine, she said ; "We have all our little wishes, and this is one of mine," and further that she was going out of town and "when we go from home we never know what may happen."

It further appeared that neither of them could see the signature of the testatrix, there being a piece of blotting-paper covering about one-third of the sheet on which they wrote terminating at the lowest crease, which brought it down to close above the signature of Ann Harradine, the first attesting witness.

In cross-examination Ann Harradine at first adhered to her statement that she could not see Mrs. Gunstan's signature, adding however, "Sometimes I have thought I did, but I could not say whether I did or not."

The defendants, by their statement of defence, denied that the will was duly executed, and claimed that the Court should pronounce against the will propounded by the plaintiff.

William Willoughby Gunstan, a legatee under the will for 1000*l.*, obtained leave to intervene.

Bayford, appeared for the plaintiff.

Inderwick, Q.C., and *Middleton*, for the defendants.

H. F. Dickens, for W. W. Gunstan, intervener.

Dec. 9, 1881. SIR J. HANNEN, President. I am extremely sorry that in this case I should be obliged to find against an instrument of this kind, which there can be no doubt does carry out the lady's wishes, and which she supposed to be a will. But, unfortunately, she has not followed the excellent advice which was given to her of employing a professional man who would have seen everything done properly. And I therefore have to deal with the question upon the evidence of two persons whose intention to tell the truth I do not for a moment doubt, but who, from their want of experience in such matters, have not been able to apply their minds to the subject, as it was desirable the minds of witnesses should be applied when a will is executed, and I have with great difficulty to pick out from their somewhat differing (without saying conflicting) statements what really happened. That this lady knew, from the information that had been given

her, what was wanted, I cannot doubt. She has written out the attestation clause herself, and had it explained to her by a competent person.

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Now I am afraid it results from the evidence of the two witnesses that certainly neither of them saw the testatrix sign the will. They differ as to their account of the incidents, but they both of them agree in that.

The aunt says that Mrs. Gunstan was laying down the pen and putting the blotting paper on the writing when she went in. The niece says she had got the pen in her hand, and the first thing she did was to ask her to sign, but, as I say, they neither of them allege, and from the course of events I cannot see any ground on which I can come to the conclusion, that she did in fact sign in their presence. And it therefore comes to the question whether or not she acknowledged it in their presence.

Now that she did not use any expression with reference to her signature seems to be agreed upon by both of them. Neither of them use any language which leads to the conclusion that she in any way said "This is my signature." They both of them agree that they did not see her signature, and it seems rather to depend upon whether or not she said it was her will, but neither of them says she used that expression. Without entering into the question whether a mere statement to that effect would be sufficient, at any rate when there is an absence of acknowledgment that the instrument is the will of the testatrix, and an absence of acknowledgment of the handwriting, the statute is not complied with.

As I have already said, I greatly regret that I should be obliged to come to the conclusion, but I cannot say that my mind is satisfied that this lady did either sign the will in the presence of the two witnesses or acknowledge it in their presence, and, therefore, with the reluctance which I have more than once expressed, I am compelled to say that there is no proof that the will was duly executed. But as it fails entirely by reason of the action of the testatrix, while rejecting proof of the will I allow the costs of both parties out of the estate.

The costs of W. W. Gunstan, the first intervener, were also allowed out of the estate.

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From this decision W. W. Gunstan appealed. The appeal came on to be heard on the 13th of February, 1882.

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Dr. Deane and *Dickens*, for the appellant. The attestation clause supplies the deficiency in the parol evidence of the witnesses. It is not contended that the will was signed in the presence of the witnesses, but that it was acknowledged in their presence.

[JESSEL, M.R. The attestation clause only refers to signature; how can it help you if you admit that the will was not signed in the presence of witnesses?]

If the Court is satisfied that the signature is there, and the testator acknowledges the will, that is enough: *Vinnicombe v. Butler* (1); *Gwillim v. Gwillim* (2); *Beckett v. Howe*. (3)

The rule "*Omnia præsumentur ritè esse acta*" applies even where the attestation clause is incomplete: *Vinnicombe v. Butler*. (1)

[JESSEL, M.R. I think the question ought to be argued whether the will must not be taken to have been signed in the presence of the witnesses.]

The testatrix had been distinctly informed that the will must be signed in the presence of witnesses, and an attestation clause was made out on that footing. In such a case the presumption arising from the attestation clause is greatly strengthened: *In re Huckvale* (4), and can only be rebutted by most distinct evidence that the will was not signed in the presence of the witnesses.

Inderwick, Q.C., *C. A. Middleton*, and *T. Lee Roberts*, contra. The witnesses agree in saying that all that was done to the will was complete before they came in.

[JESSEL, M.R. *Lloyd v. Roberts* (4) is in your way.]

Both witnesses speak positively to the fact of the blotting paper being over the sheet so that they could not see any signature. In *Ilott v. Genge* (5) a distinction is drawn between

(1) 3 Sw. & Tr. 580.

(2) 3 Sw. & Tr. 200.

(3) Law Rep. 2 P & D. 1.

(3) Law Rep. 1 P. & D. 375.

(4) 12 Moo. P. C. 158.

(5) 4 Moo. P. C. 265.

signature under the Statute of Frauds and signature under the Wills Act, and a mere calling in witnesses to sign a paper without their being able to see whether there was a signature was held insufficient: *Ilott v. Genge* (1), *Doe v. Jackson* (2), there referred to, and *Hudson v. Parker* (3), are against the sufficiency of the acknowledgment. *In re Swinford* (4); *Beckett v. Howe* (5); *Pearson v. Pearson* (6) are in our favour. The witnesses have not simply forgotten the transaction, they remember a great deal, and everything they remember is against the appellant. Signature in the presence of the witnesses is decidedly disproved.

[*Smith v. Smith* (7) and *Cooper v. Bockett* (8) were also referred to.]

Dr. Deane, in reply. It does not appear that there was any attestation clause either in *Ilott v. Genge* (9) or in *Hudson v. Parker*. (10)

Feb. 14. JESSEL, M.R. I regret that I am unable to come to the conclusion that this will was properly executed. I say I regret, because from a mere accident, a want of form, that which was clearly the last will of this lady must fail of effect, and the persons interested under it be disappointed.

The real question is, what the law requires to be proved in order to support a will so that it shall be validly executed.

In this case it does not appear that the testatrix signed her name to this document in the presence of the witnesses. I invited the counsel for the appellant to argue the question upon the basis of these witnesses having seen the lady sign her name, but I agree that *Dr. Deane* knew more of the case than I did, and was wise in declining to argue it on that footing, for on careful examination of the evidence in this case I think it is clear that this will was not signed in the presence of either witness; it is evident that the signature took place before they came into the room. The question, then, arises whether the testatrix acknowledged her signature before the witnesses. What is in

(1) 3 Curt. 160.

(2) *Ibid.* 181.

(3) 1 Rob. 14, 25.

(4) Law Rep. 1 P. & D. 630.

(5) Law Rep. 2 P. & D. 1.

(6) Law Rep. 1 P. & D. 451.

(7) Law Rep. 1 P. & D. 143.

(8) 4 Moo. P. C. 419.

(9) *Ibid.* 265.

(10) 1 Rob. 14.

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law a sufficient acknowledgment under the statute? What I take to be the law is correctly laid down in Jarman on Wills, 4th ed. p. 108, in the following terms: "There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will"; and I may add, in my opinion, it is not sufficient even if the testator were to say, "My signature is inside the paper," unless the witnesses were able to see the signature. There is a great deal of authority on this point, several cases are referred to in the note to the passage which I have read, but I think it is sufficient to mention three cases only. The first is *Hudson v. Parker* (1), where (2) the matter is most elaborately discussed by Dr. Lushington. He tells us what in his view is the plain meaning of acknowledging a signature in the presence of witnesses; he says, "What do the words import but this? 'Here is my name written, I acknowledge that name so written to have been written by me; bear witness.' How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there *and seen* at the time; for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning, acknowledgment, and approbation."

Now I have to consider the case of *Beckett v. Howe* (3), where a different rule was laid down by Lord Penzance. At page 5 he says, "The doctrine of *Gwillim v. Gwillim* (4) is this, that if the testator produces a paper and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an

(1) 1 Rob. 14.

(2) 1 Rob. at p. 25.

(3) Law Rep. 2 P. & D. 1.

(4) 3 Sw. & Tr. 200; 29 L. J. (Pro.) 31.

acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the will at the time. Whether that decision was right or wrong I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will and his signature is there at the time, it is sufficient." I dissent from the proposition of Lord Penzance, and agree with the ruling of Dr. Lushington, and therefore I hold that it is not sufficient to say "This is my will." The argument that that will do is founded on the notion that the statement by the testator "This is my will" implies that his signature is affixed to it; but that is not so, a will is not a valid will until it is attested, and there is no necessary implication that it already bears the testator's signature. It may be that the testator has not yet signed it, but may intend to do it, and it is quite possible that he may in that sense call it a will, inasmuch as it will, when executed, be a will. But I say that if he had distinctly said that he had signed the will, but yet the witnesses would not be able to see his signature, that is not a sufficient acknowledgment. Is there any doctrine to the contrary? Lord Penzance does not, to my mind, lay down any new doctrine, he thought himself bound by the decision of Sir Cresswell Cresswell in *Gwillim v. Gwillim*. (1) I will now turn to that case, and with great deference to Lord Penzance, I do not think Sir C. Cresswell laid down such a doctrine. I agree people may, in reading the decision, as I am bound so to say considering that Lord Penzance so read it, come to the same conclusion as he did, but I think that Sir C. Cresswell did not decide or intend to decide anything of the kind. In *Gwillim v. Gwillim* (1) the signature of the testator (as printed in the report) is placed immediately above the signature of the witnesses. If nothing was put upon the signature it was impossible for the witnesses to sign their names without seeing the signature if it was there, and the argument therefore turned upon the question whether the signature was there or not. The present question was not under discussion. The material part of the judgment is on p. 205, "I am therefore at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator,

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who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then if I look at the position of the words, I find at the top of the third page, 'My will and testament, 1856, March 31st.' Under that comes 'Brange, Mar. 31, 1856,' that being the time and place at which the old ladies say they were asked to sign the will. Under that comes 'John Gwillim,' and then the word 'witness' a little below on the left hand side where one would expect to find it. I cannot, therefore, but think that the name of the testator was written at that time, and that by asking these old ladies to witness his will he did acknowledge his signature."

Now that I say is *Hudson v. Parker*. (1) The witnesses were taken to have seen the signature and the testator having then asked them to witness his will, he was held to have acknowledged his signature. I cannot find one word in the judgment to shew that Sir C. Cresswell was of opinion that if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. I do not think the decision bears out the interpretation put upon it by Lord Penzance, namely, that there was any new doctrine laid down in that case different from the doctrine of *Hudson v. Parker*. (1) The existence of any such doctrine rests entirely on the statement of Lord Penzance in *Beckett v. Howe* (2); and as I think there was no sufficient ground for that statement, I am of opinion that the case of *Beckett v. Howe* (2) is no authority.

If that is so, there is only one other point, and that is, did the witnesses see the signature? I am of opinion upon the evidence that they did not. Susan Harrardine says in express terms that she did not; that there was a piece of blotting-paper over the signature. I have looked carefully at the original writing, and the appearance of the document strongly confirms the statement of this witness. The words, including the signature of the testatrix, are dull and blurred as if they had been blotted, and it would appear as if the blotting-paper reached down below the signature of the testatrix. The other witness says the same thing in the first instance, and then subsequently that she sometimes thought

(1) 1 Rob. 14.

(2) Law Rep. 2 P. & D. 1.

that she did see the signature, but she could not say whether she did or not. I must upon this evidence come to the conclusion that it is most satisfactorily, or rather most unsatisfactorily, proved that these witnesses did not see the signature.

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I refrain from going into the next question whether sufficient expressions were used by the testatrix as to the document being her will. If it were necessary I should take more pains to consider the meaning of the words used; but I think it is unnecessary to do so on the present occasion, having regard to the conclusion of fact that the witnesses did not see the signature of the lady, and the decision of the learned President pronouncing against the will must be affirmed.

BRETT, L.J. In this case we have a document which is in form a will, leaving a large amount of property, and it is undoubted that the testatrix meant thereby to deal with her property in the manner therein pointed out, and it is equally clear that she signed the document meaning it to be her will, and equally clear that she thought she was complying with the requirements of the statute, and that this document represents her last and final intentions as to the disposition of her property.

That being so, no one can be astonished if the Court should have made every endeavour to uphold it so far as it could in accordance with law, for one must feel distressed at the result that the disposition of her property which this lady intended to make must depend upon the accident of putting a piece of blotting paper a quarter of an inch higher or lower. But we have to consider here an enactment of a statute, in which there is no elasticity, we are bound to say whether this particular will complied with the requirements of the statute.

I think it did not, and our decision must be attended with the unhappy consequence that the clearly known and expressed intention of this lady with regard to her property must be set aside, and persons whom she clearly meant to benefit be deprived of all benefits under it.

The first point is what are we now, as a Court of Appeal, to assume to be the real facts of the case as shewn by the evidence in the Court below. If the learned President of the Probate

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Division had come to the conclusion from the evidence before him, and on seeing the witnesses, even if they had used the expressions which are now before us on paper, that in fact this lady did sign in the presence of these witnesses, I should not be inclined to disagree with his conclusion; or if he had found or collected from what the witnesses said, that they could not say whether the signature was or was not under the blotting paper, and he had come to the conclusion that the signature was visible, and that what the lady said was "This is my will," I should have agreed. But I think that he must be taken to have come to the conclusion from the evidence, and the conclusion seems borne out by the appearance of the document itself, that the blotting paper was so placed that the witnesses not only did not but could not see the signature. If then they did not and could not see the signature, did this lady say "This is my whim," or "This is my will." I shall assume, as being against rank absurdity, that she said "this is my will." The question then raised is whether it is a compliance with the statute, if a testatrix, when two witnesses are present for the purpose of attesting a document, should say in their presence "this document is my will," whether that is a sufficient acknowledgment if at the time the witnesses did not and could not see the signature. That is a point of law, and on this point we must give our judgment. It is a point which must be decided upon the statute itself, and even if twenty cases decided that it would be a sufficient acknowledgment, if we were clearly of opinion that according to the true construction of the statute it would not do, we should not be bound by those cases. Where there have been several decisions or a series of decisions upon any statute, I should dread to overrule those decisions or that series of decisions, but still we should be compelled so to do if we thought that those decisions were not in accordance with the statute. But in this case we have no long line of decisions one way; there seem to be conflicting decisions, and we must accordingly exercise our own judgment on the question independently almost, if not quite, of every former decision.

It is clear that *Hudson v. Parker* (1) dealt exhaustively with the very point, and the opinion of Dr. Lushington was that, whatever

(1) 1 Rob. 14.

might be the case under the older statute, on the statute then before him, and which is now before us, where a will has not been signed by the testatrix in the presence of two witnesses, and where it is necessary therefore to rely on an acknowledgment under the statute, then even though the signature be there, and whatever is done be done in the presence of two witnesses together at the same time, if they do not see or do not have the opportunity of seeing the signature, whatever the testator may say there is not an acknowledgment in the meaning of the words of the statute. To make it such an acknowledgment they must see or have the opportunity of seeing the signature. That is the interpretation put by Dr. Lushington on the statute, and by the course of reasoning with which I wish respectfully to express my full agreement, it seems obvious that where an acknowledgment has to be relied upon, the witnesses must see or have the opportunity of seeing the signature. When they are required to attest the signature, they must see or have the opportunity of seeing the person signing the document. The doctrine is the same where the testator has to acknowledge his signature. I must say that looking at the statute alone, you can only get at this necessity from the meaning of "acknowledgment," not from the words "the witnesses shall attest," because it is not the signature they are to attest, but the will. The question turns on what is meant by acknowledgment.

When you find that in order to make the signature sufficient the witness must see the person sign, so when a signature is to be acknowledged they must see that there is a signature, and the testator must then in their presence say something equivalent to "That is my signature"; so that if they do not have the opportunity of seeing the signature, even if he say before them, "My signature is in this instrument," that will not do. That I take to be the decision of *Hudson v. Parker*. (1)

It is said that the case of *Gwillim v. Gwillim* (2) before Sir C. Cresswell, and the case of *Beckett v. Howe* (3) before Lord Penzance are to the contrary. As to the latter case there is no doubt that it is—and so it has been held. It is said that Lord

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(1) 1 Rob. 14.

(2) 3 Sw. & Tr. 200.

(3) Law Rep. 2 P. & D. 1.

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Penzance decided it on the authority of *Gwillim v. Gwillim* (1), and that that case does not decide what his Lordship thought it did. As regards this proposition I feel very great difficulty.

There has never been, certainly not in our time, so great a master of what I would call transparently lucid exposition as Sir C. Cresswell, and therefore when I find that learned judge saying this, "I am therefore at liberty to judge from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not," I cannot bring my mind to think that the proposition which he thought he had to solve was not this, and this only, whether the signature was or not on the will at the time of the attestation. Moreover, if there is a judge who is less likely to make a mistake as to what another judge has said, that judge is Lord Penzance, a clearer mind does not exist: and, therefore, when he comes to the conclusion that Sir C. Cresswell meant what he says he meant, it strengthens my view as to the meaning of Sir C. Cresswell in that case. Therefore we are reduced to this misfortune in arriving at the conclusion we have come to, that we are differing from both those judges. It may be said that in *Gwillim v. Gwillim* (1) the point was not raised or was not argued, and the case of *Hudson v. Parker* (2) was not even cited—the argument went on another line—but I do think that Sir C. Cresswell did intend to lay down the proposition of law which Lord Penzance understood him to lay down.

But on mature consideration, all I can say is that I differ on this question from those judges, and I feel bound to say that when I do differ from two such judges, I entertain much more doubt as to the propriety of my decision than of theirs. But still it is our duty to decide to the best of our powers, and I am of opinion that, according to the true construction of this statute, witnesses must see or have the opportunity of seeing the signature. It has been brought to this, where the witnesses cannot see, have no opportunity of seeing, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there and they see or have the opportunity of seeing it, then if the testator says this is my will or

(1) 3 Sw. & Tr. 200.

(2) 1 Rob. 14.

words to that effect, that is sufficient acknowledgment, although he does not say this is my signature. I therefore think that this will cannot stand.

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HOLKER, L.J. I also regret that the Court is constrained to come to a conclusion which will invalidate the will, but the Court must be relentless and must judge according to law and fact, without regarding the possible consequences of the decision it feels bound to give.

The appeal has been argued on two grounds, first that the evidence was not enough to shew that the testatrix did not sign her will in the presence of two witnesses; and, secondly, that if she did not she acknowledged her signature before other witnesses.

The first ground was put forward by Dr. Deane rather on the suggestion of the Court. The will is, upon the face of it, in due form; the lady who made the will was properly instructed as to what she had to do; she knew that it was necessary to sign it before the witnesses, and that they should sign in her presence. The attesting clause was in proper form; it is said that all these matters being strictly correct, the maxim of law, "*Omnia præsumuntur ritè esse acta*," must apply. It is further said that the result should be the same, even though this finding would not be quite in accordance with the testimony of the witnesses. That might be the case if the witnesses who came forward to prove the will had been in doubt or could not remember whether they did or did not see the testatrix sign. The fact that everything appears to have been rightly done would entitle the Court to come to the conclusion that they did in fact see her sign. But when you have to prove a will strictly, and if they both say, or one of them says, they did not see her sign, it is impossible to say that there is proof of due execution. Therefore, where as here one positively says that she did not see her sign, and the other doubts, it is clear that that kind of testimony is not sufficient to establish the validity of the will.

The other ground on which Dr. Deane relied was that there was here a sufficient acknowledgment of the signature of the testatrix to her will made to the two witnesses. Now we come upon the second ground, as to what the cases have decided. What

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sort of acknowledgment is enough? According to the statute the signature is to be made before two witnesses, or the signature is to be acknowledged before two witnesses. For what purpose? To enable them to testify to the signature or to the acknowledgment of the signature.

It is clear that good sense requires that the acknowledgment to which the witnesses are to bear testimony should be an acknowledgment of the signature seen or capable of being seen by the witnesses. Although the words of the statute are, "such witnesses shall attest the will" and not "the signature," it seems to me that it comes to the same thing, for when the document is properly signed or acknowledged in the presence of the witnesses, it becomes a will. So to my mind, to bear testimony to a will is the same thing as to bear testimony to the signature.

That being so, it was decided in *Hudson v. Parker* (1) that the true view of the section was that, to constitute an acknowledgment sufficient within the statute, the witnesses must see, or be able to see, the signature of the testator, and if so, there is no such acknowledgment in the present case, because, as far as the evidence goes, the signature of this testatrix was carefully concealed. Certainly both witnesses did not see the signature. But putting that difficulty out of the way, I should think it was not enough to prove that the witnesses saw the signature, but they should also know what this document which is signed really is. But the evidence goes to this, that this lady never said, "This is my will." According to Susan Harradine she said, "We have all our little wishes and this is one of mine." According to Ann Harradine she said, "It is a little whim of mine." To my mind it is not very extraordinary that this lady getting these two servants to attest should not care particularly for them to know that this was her will, she might be afraid of exciting curiosity; and at any rate Ann says in her evidence that if she had said that it was her will, she would have taken more notice.

The testatrix does not say, so far as the evidence goes, that it is her will, she does not say even that her signature is under the blotting-paper, therefore even if *Hudson v. Parker* (1) were out of the way, it would be a difficult thing to say that this signature

(1) 1 Rob. 14.

was acknowledged in the presence of two witnesses. I am therefore of opinion that this decision of the president is right and must be affirmed. 1882

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*Appeal dismissed, but under the circumstances costs
of all parties ordered to be paid out of the estate.*

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Solicitor for appellant: *W. H. Orchard.*

Solicitors for respondents: *Lucas & Son; Bell, Brodrick, & Grey; Cooper & Walker.*

M. W.

[IN THE COURT OF APPEAL.]

April 4.

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Damage to Cargo—Practice—Particulars.

The rule as to giving the opposite party particulars of any general allegation in pleadings ought to be the same in the Admiralty as in the Queen's Bench Division. Where, therefore, in an action in the Admiralty Division by cargo owners against shipowners for delivery of cargo in a damaged condition, the statement of claim alleged that the damage was not occasioned by any of the excepted perils mentioned in the bill of lading under which the cargo has been shipped, but was occasioned by the defective condition of the vessel or by the negligence or breach of duty of the defendants or their servants, it was *held* by the Court of Appeal (Lord Coleridge, C.J. and Brett and Holker, L.JJ.), reversing the decision of Sir Robert Phillimore, that the defendants were entitled to particulars of the defects rendering the vessel not fit to carry the cargo.

THIS was an action under the 3rd section of the County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), instituted in the City of London Court on behalf of the assignees and indorsees of bills of lading of a cargo of pease laden on board the steamship *Rory* against the steamship *Rory*, and transferred to the Admiralty Division of the High Court under the provisions of the same Act and the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).

The statement of claim alleged in the first five paragraphs thereof that the cargo of pease had been shipped on board the *Rory* at Montreal in good order and condition, and by the terms of such bills of lading was to have been delivered at the port of London in the like good order and condition, certain perils and

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casualties therein mentioned only excepted; that the *Rory* sailed on her voyage and arrived in London, and that the cargo had been then delivered to the plaintiffs, but not in as good order or condition as when shipped at Montreal, and, as to a large portion thereof, in a damaged condition. The 7th and 8th paragraphs of the statement of claim were in terms as follows:—

7. The damage and deterioration of the said cargo were not occasioned by any of the perils, casualties, and causes in the said bills of lading excepted.

8. The said damage and deterioration were occasioned by the defective condition of the said vessel by reason that the said vessel was not reasonably fit to carry the said cargo on the said voyage, or by the negligence or breach of duty or contract on the part of the defendants, their servants or agents.

On the 21st of February the solicitor for the defendants, the owners of the *Rory*, took out a summons calling upon the plaintiffs to shew cause before the registrar why the plaintiffs should not deliver particulars of the defects, negligence, and breaches of duty or contract alleged in the 8th paragraph of the statement of claim.

The summons was heard before the registrar on the 25th of February, and the registrar ordered that the plaintiffs should deliver to the defendants particulars of the defects rendering the *Rory* not reasonably fit to carry her cargo, as alleged in the 8th paragraph of the statement of claim.

Feb. 28. *Butt, Q.C.*, for the plaintiffs, moved the judge in Court to rescind the above-mentioned order of the registrar of the 25th of February. The particulars asked for by the defendants cannot be presumed to be within the knowledge of the plaintiffs or their agents, and therefore it would be contrary to the practice of the High Court of Admiralty to order the plaintiffs to deliver them: *The Freedom*. (1) The plaintiffs are entitled to rely upon proving by cross-examination of the defendants' witnesses at the trial that defects as to which they cannot now furnish specific information existed in the *Rory*. Moreover, independently of the charges contained in the 8th paragraph of the claim, the defend-

(1) Law Rep. 2 A. & E. 346.

ants, in order to successfully defend the action, must at the trial account for the damage to the goods and shew that it was occasioned by the excepted perils, and thus incidentally they must prove the seaworthiness of their ship. The 8th paragraph therefore does not substantially impose any additional onus of proof upon the defendants.

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G. Bruce, for the defendants. The plaintiffs have chosen to allege that the ship was in a defective condition, and the defendants at the trial must be prepared to meet that charge, and they cannot do so unless they have some information by way of particulars of the nature of the defects alleged. In the Queen's Bench Division such particulars would be ordered as of course, and since the Judicature Acts the practice in this division as to particulars ought to be the same as the practice in the other divisions of the High Court.

An order for particulars similar to that made by the registrar in this case was recently made by the judge in chambers in the case of *The Signet*. (1)

SIR ROBERT PHILLIMORE. I am of opinion that the order of the registrar must be rescinded as asked for by the motion. I do not consider that the defendants are entitled to obtain from the plaintiffs particulars of the defective condition of their ship. The motion will be granted with costs.

G. B.

The defendants appealed.

April 4. *Cohen*, Q.C. (*G. Bruce*, with him), for the defendants.
Gray (*Butt*, Q.C., with him), for the plaintiffs.

LORD COLERIDGE, C.J. I am of opinion that this appeal should be allowed. The action is in the Admiralty Division, and

(1) [1881 R. No. 767.] This case is not reported. It was a case of damage to cargo in which the statement of claim was similar to the statement of claim in the above case of the *Rory*, and on the 10th of November, 1881, an order was made by the judge in Chambers

that the plaintiffs should deliver particulars of the alleged unseaworthiness of the ship. The plaintiffs' counsel did not oppose the making the order. Solicitors for plaintiffs: *T. W. Rossiter*. Solicitors for defendants: *Gregory, Rowcliffes, & Co.*

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is brought by the indorsees of bills of lading of cargo shipped on board a steamship against the shipowners, for the delivery of such cargo in a damaged condition, such damage being alleged in the statement of claim not to have been occasioned by any of the excepted perils in the bills of lading, but by reason of the vessel not being reasonably fit to carry the said cargo, or by the negligence of the defendants or their servants. I think that such a mode of pleading as this general allegation in the plaintiffs' statement of claim may be allowed in order to avoid prolixity, but then to prevent the defendants from being taken by surprise, this should be supplemented by particulars, and if the defendants ask for them the plaintiffs should be required to say on what defects in the vessel they rely as making it unfit for the carriage of the cargo. If it be only an inference they draw from the state in which the cargo was when it arrived let them say so, but they are bound to communicate what they know, and if at any other time before the trial they should obtain any other knowledge of any matter occasioning the damage on which they should wish to rely they should give it to the defendants, by amending the particulars, which they might do from time to time as they should obtain fresh information on the subject. I do not think that the general principles laid down by Sir R. Phillimore in *The Freedom* (1) conflict with this. The object of the rules of pleading is, he says, to prevent either party being taken by surprise at the hearing, and if during the trial it should appear that one of them relied on any act of which he had knowledge which took the other by surprise, Sir R. Phillimore would probably adjourn the trial in order to enable such other to produce evidence in contradiction. That may be very proper in the Admiralty Division, but it would not do to pursue that course in the Queen's Bench Division. In this case I think that the particulars asked for should be given.

BRETT, L.J. It would be strange if a different rule as to giving particulars to the opposite party should prevail in the Admiralty Division from that which prevails in the Queen's Bench Division, for this is really a common law action which might have been brought in the Queen's Bench Division, but which has been given

(1) Law Rep. 2 A. & E. 346.

to the Admiralty Division in order to enable the plaintiffs to enforce their claim against the ship. The rule, however, as to the delivery of particulars is founded on considerations which are applicable to all Courts. In order to prevent the necessity of a minute statement of all the facts in pleading a general allegation is often allowed, as, for instance, in the case of fraud, but then in order to have a fair trial the party who makes such general allegation is always bound to give particulars of it to the opposite party, so that he shall not be taken by surprise, and shall also be able to defend himself against that with which he is charged. Now how are the defendants to meet the case contained in the 8th paragraph of the statement of claim? Do the plaintiffs mean by what is there stated that there was a defect in the construction of the ship, or that there was not a proper crew, or that the master was drunk, or that he did not put the hatches down when there was a storm. If the plaintiffs were to state in their particulars that they rely on one only of these matters, then there would be no necessity for the defendants to send all over the world to meet a case founded on the others, as they might otherwise have to do. I can see no reason why the procedure in this respect should be different in the Admiralty Division from what it is in the Queen's Bench Division. In *The Freedom* (1) the reason given by Sir Robert Phillimore for not allowing particulars in the Admiralty Division is that if the parties are taken by surprise the Admiralty Court can postpone the inquiry. That is not a reason to be adopted; in such a case as the present the trial might have to be postponed until a commission had been sent to the other side of the world, and I cannot agree to there being a different proceeding in such a matter as the present between the Admiralty and the other Divisions of the High Court.

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HOLKER, L.J., concurred.

Appeal allowed.

Solicitors for plaintiffs: *J. Cooper & Co.*

Solicitor for defendants: *James Neal.*

(1) Law Rep. 2 A. & E. 346.

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June 6.

[IN THE COURT OF APPEAL]

MEDLEY v. MEDLEY.

Practice—Divorce Court—Alimony—Permanent Maintenance—20 & 21 Vict. c. 85, s. 32 [Revised Ed. Statutes, vol. xiii., p. 256]—29 & 30 Vict. c. 32, s. 1 [Revised Ed. Statutes, vol. xv., p. 36]—Husband's Property Abroad.

The provisions of 20 & 21 Vict. c. 85, s. 32, respecting permanent maintenance empower the Court to order a gross or annual sum to be secured for the benefit of the wife, but not to make a direct order on the husband to pay a gross or annual or other periodical sum to the wife.

The qualification that the maintenance is to be for the wife “*dum sola et casta vixerit*” is not usually inserted in the order but in the deed of security.

The provisions of 29 & 30 Vict. c. 32, respecting the payment of monthly or weekly sums to the wife do not apply to the case of a husband who has property abroad sufficient and available for a security.

Per Jessel, M.R., an order for maintenance cannot be made in the alternative for securing a gross or annual sum of money, or else for the payment of monthly or weekly sums by the husband.

IN this case a petition was presented in the Probate Division in April, 1880, by Mrs. Medley, for a dissolution of marriage on the ground of her husband's bigamy and adultery. The marriage took place in November, 1877, and the parties after living for a short time together separated, when Mr. Medley agreed to make an allowance to his wife of 500*l.* a year.

On the 28th of July, 1881, a decree nisi for the dissolution of the marriage was made, which in due course was made absolute.

On the 5th of November, 1881, Mrs. Medley presented a petition for permanent maintenance. A reference having been directed as to her husband's property, it appeared that it consisted almost exclusively of shares and mortgages in foreign countries, and that he resided in Paris, where he rented an expensive house and lived in considerable style. The registrar estimated his income at 1660*l.*

On the 29th of April, 1882, the President (Sir J. Hannen) made an order in the following terms:—That T. P. Medley do to the satisfaction of the Court secure to the petitioner the gross sum of 7500*l.* within one month from this date, or that within the same time he do secure to the petitioner the sum of 500*l.* per annum for her life; and in the event of his not doing so then that

he pay to the petitioner the sum of 500*l.* per annum, by equal monthly payments of 41*l.* 13*s.* 4*d.*, the first payment to be made on the 29th of June next, and the succeeding payments to be made respectively on the 29th day of each following month.

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From this order the respondent appealed.

Searle (*McIntyre*, *Q.C.*, with him), for the respondent. The order is irregular in two respects; first, the allowance is made to the petitioner absolutely, whereas it ought to have been *dum sola et casta vixerit*. It is the usual course to introduce this qualification, except under special circumstances: *Fisher v. Fisher* (1); *Sidney v. Sidney*. (2) Secondly, the order is made in the alternative either for a gross sum or an annuity to be secured, which is done under the provisions of the 20 & 21 Vict. c. 85, s. 32, or else for a monthly payment to be made by the husband, which is done under the 29 & 30 Vict. c. 32, s. 1. But these Acts apply to different cases, the first Act being applicable where the husband has available property, and the second where he has none. In the present case the husband has sufficient available property, and therefore the Act of 1866 is not applicable. Consequently, the second part of the order ought to be struck out. Moreover, the amount ordered to be secured for the wife is unreasonable, and is not justified by the evidence of the amount of the husband's property.

Inderwick, *Q.C.*, and *Bayford*, for the petitioner. Sir J. Hannen declined to insert the words "*dum sola et casta vixerit*" in the order, because it is unusual to do so. If they are inserted at all this will be done in the deed, which will have to be settled by the conveyancing counsel of the Court. With respect to the second point, the Act of 1866 is applicable, because, although the husband has considerable property, it is none of it in this country, and is not available as a security for the sum ordered to be secured. There is nothing unreasonable in making an alternative order in this form, for it may be found impossible to obtain the security ordered.

JESSEL, *M.R.* In the first place, as to the substance of this

(1) 2 Sw. & Tr. 410.

(2) 4 Sw. & Tr. 178, 182.

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order, namely, the amount of the allowance ordered, I am clearly of opinion that this Court ought not to interfere with the discretion exercised by the judge, more especially as upon the motion before us, the sum awarded does not appear too large, and the husband, who has declined to attend to give evidence as to his property, had on the occasion of his separation from the petitioner in 1878, agreed to make her an annual allowance of 500*l*.

As to the second point—the insertion of the proviso “*dum sola et casta vixerit*,” it appears from the note of what took place before the learned judge that he did not decide adversely to the appellant, but left the question to be determined when the deed by which the allowance was to be secured came to be settled. Therefore the appellant has nothing to complain of on that point.

The further point was, however, one of more difficulty, as to the form of the order by which the appellant was ordered in the alternative to pay to the petitioner the annual sum of 500*l*. by monthly payments. Now, when we look at the 32nd section of the 20 & 21 Vict. c. 85, the word “secure” appears to be used in a particular way. It is contrasted with payment. The words are, “that the Court may order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune, &c., it shall deem reasonable;” and then at the end of the section it provides that “upon any petition for the dissolution of marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or allowance to his wife as it would in a suit instituted for judicial separation.” Therefore I think that the intention of the legislature was that the gross or annual sum should not be ordered at once to be paid over to the wife but should be secured, and being secured should be paid to her from time to time; that would give a meaning to the word “secure” as contrasted with “pay.” What confirms me in this construction is the passing of the Amendment Act, 29 & 30 Vict. c. 32. If “securing” in the first Act included payment, the second Act would have been useless. That Act, after enacting that it some-

times happened that a decree for dissolution was obtained against a husband who had no property on which the payment of a gross or annual sum could be secured, provided that the Court might order monthly or weekly payments to be made by the husband to the wife. This Act could not have been passed to meet any supposed difficulty that an "annual sum" could only be paid once a year, and to enable the sum secured to be paid by monthly or weekly instalments. The recital shews this. It refers expressly to husbands "who have no property on which the payment of any such gross or annual sum can be secured." And that expression is an answer to the argument that it is applicable to a case like the present, in which the husband has property abroad but not in this country. If he has property abroad then he has property on which the payment of the alimony can be secured, and he can be attached if he fails to comply with the order.

Therefore it appears to me that it was not intended by the first Act that an order should be made for payment of the allowance directly by the husband to the wife. And I also think that the second Act is not applicable, because the husband has property on which the allowance can be secured. Besides, I do not think that you can make an alternative order of this kind. You must proceed under one Act or the other. The result is that the alternative part of the order must be discharged.

LINDLEY, L.J. I am of the same opinion. The first question is, what is the true construction of the 32nd section of the 20 & 21 Vict. c. 85? At first sight it might appear as if the term "secure" would include payment, but when looked at more closely, and when the second Act is taken into consideration, I think it is clear that it does not include payment, but that the sum gross or annual was to be secured so as to provide a fund for the wife. Therefore the alternative part of the order cannot be sustained under the 32nd section of the first Act.

Then the second Act (29 & 30 Vict. c. 32) only authorises monthly or weekly payments to be ordered when the husband has no property upon which such sum can be secured, and does not apply to a case like the present in which the husband has property which is abundantly sufficient for a security although it

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is situate abroad. Therefore neither on the first nor second Act can the alternative part of the order be sustained.

As to the amount of the sum ordered to be secured, I agree with the Master of the Rolls that there is no cause for reducing it. With respect to the clause "dum sola et casta vixerit," the matter stands in this way. The Act says nothing about it, and the only question is whether the order should be qualified by the insertion of such a clause, or whether it should be left to be decided when the deed of security is settled. The latter appears to be the ordinary course, and I see no reason for departing from it.

The respondent having failed in the material part of his appeal, must pay the costs of the appeal.

BOWEN, L.J., concurred.

Judgment accordingly.

Solicitors for petitioner: *Harwood & Stephenson.*

Solicitors for respondent: *Eardley, Holt, & Richardson.*

M. W.

July 3.

[IN THE COURT OF APPEAL.]

THE MAC.

Salvage—Appeal from Justices—Jurisdiction—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 2, 458, 460—Meaning of "Ship or Boat stranded or otherwise in distress on the Shore of any Sea or Tidal Water."

Justices awarded salvage in respect of services rendered to a hopper barge, which had been found adrift without any person on board of her in the Wash about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes:—

Held, that the barge was a "ship in distress on the shore of a sea or tidal water" within the meaning of the Merchant Shipping Act, 1854, s. 458, and that the justices had jurisdiction to award salvage.

The Leda (Sw. 40) followed.

APPEAL by the owners of the *Saucy Polly* from the judgment of Sir R. Phillimore in favour of the owner of the *Mac*.

The facts of the case are fully stated in the report of the proceedings in the Admiralty Division. (1)

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June 30, July 3. *Bucknill*, for the owners of the *Saucy Polly*. It is submitted that the *Mac* was a "ship," as that word is defined by the Merchant Shipping Act, 1854, s. 2. It is true that she could not propel herself; but no case appears to exist in which it has been held that a vessel which does not propel herself is not a "ship" within the meaning of that enactment. The *Mac* had a mast, she was capable of being towed, and the facts proved at the hearing before the justices established that she had been towed from Holland. She was found at sea. These circumstances shew that she was a "ship." In *Ex parte Ferguson* (2) it was held by Blackburn, J., that if a vessel is capable of going to sea she must be considered to be a "ship." In *The Andalusian* (3) it appears to have been held by Sir R. Phillimore that an unfinished vessel which is being launched is a "ship."

W. G. F. Phillimore, for the owner of the *Mac*. The decision in *The Andalusian* (4) is not in point. No vessel which is incapable of moving herself can be considered a "ship." The *Mac* did not go to sea; she was used merely for dredging purposes; therefore she cannot be a "ship." *The C. S. Butler*. (5) The jurisdiction of the justices must be construed strictly. Originally the Court of Admiralty had no jurisdiction over salvage arising within the body of a county. By 3 & 4 Vict. c. 65, s. 6, jurisdiction over claims of that description was conferred, but it extended only to ships or sea-going vessels: *The Raft of Timber*. (6) This enactment was enlarged by 9 & 10 Vict. c. 99, s. 40. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 458, 460, jurisdiction is given to justices in respect of a ship, boat, cargo, apparel, or wreck; but it does not extend further. Timber found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, is not "wreck" within the meaning of that statute: *Palmer v. Rouse*. (7) The owner of the *Mac* can accept the definition of a "ship" given by Blackburn, J.,

(1) Ante, p. 38.

(4) 3 P. D. 182.

(2) Law Rep. 6 Q. B. 280, at p. 291.

(5) Law Rep. 4 A. & E. 238.

(3) 3 P. D. 182, at p. 189.

(6) 2 Wm. Rob. 251.

(7) 3 H. & N. 505.

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in *Ex parte Ferguson* (1), for, as she was used only for dredging purposes, she must remain in shallow water, and could not be a sea-going vessel.

But, further, the *Mac* at the time when she was rescued was not “stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom” within the meaning of the Merchant Shipping Act, 1854, s. 458.

[*Bucknill*, for the owners of the *Saucy Polly*, objected that this question could not be raised, as the owner of the *Mac* had not given any notice of a cross-appeal.

PER CURIAM. We think that this point can be entertained; the judgment of the Admiralty Division was wholly in favour of the owner of the *Mac*, he could not appeal from the reasons given by the judge.]

The phrase “on the shore” means “touching the ground”; the word “stranding” must be confined to cases where the vessel takes the ground in the course of navigation. If the Legislature had intended to include cases in which the vessel is not touching the ground, it would have used the phrase “on or off the shore of any sea or tidal water.”

Bucknill was not called upon to reply.

LORD COLERIDGE, C.J. Two points have been argued in this case: the one as to the ground upon which the judgment is founded, and the other as to a matter in which the judge of the Court below took a view in favour of the salvors.

As to the first point, I am of opinion that the judgment of the Court below cannot be supported. I think it immaterial to consider whether the hopper-barge was “used in navigation” within the meaning of the Merchant Shipping Act, 1854, s. 2, because that enactment directs that the word “ship” shall “include every description of vessel used in navigation not propelled by oars.” It does not exclude other meanings of the word. I agree that to hold that a mud-barge is a ship may seem to go very far in the way of interpretation; but we must not overlook the consequences of holding that the hopper-barge is not a “ship.” She could take men on board. She falls within the definition cited in Todd’s

(1) Law Rep. 6 Q. B. 280, at p. 291.

Johnson's Dictionary of the word "ship" from Horne Tooke, namely, "formatum aliquid, in contradistinction from a raft for the purpose of conveying merchandise, &c., by water, protected from the water and the weather." Although this may not be the definition of Johnson, it is the definition of a great master of language; and I think that it applies to the present case. The learned judge in the Court below seems to have decided upon the ground that the interpretation clause (s. 2) of the Merchant Shipping Act, 1854, excluded every meaning besides the definition therein stated; he fails to deal with the question whether the hopper-barge may not be considered a "ship" in the ordinary and popular sense of the word. I decide that she is a ship in the common meaning of that term.

The second point was whether at the time when the salvage services were rendered, the hopper-barge could be considered "to be stranded or otherwise in distress on the shore of any sea or tidal water." I think that the counsel for the owner of the *Mac* was entitled to raise this point. It has been argued that as the hopper-barge was not stranded, the justices had no jurisdiction to award salvage. The learned judge in the Court below appears to have thought himself bound by the decision in *The Leda* (1), and undoubtedly he was bound by it. As this is a Court of Appeal, we are at liberty to consider the question apart from authority. Now the hopper-barge was not literally "on the shore." But the statute contains the words "otherwise in distress;" this phrase plainly contemplates some misadventure other than stranding; and it shews that "on the shore" does not mean that the vessel must be actually touching the ground. The jurisdiction of justices under sections 458 and 460 of the Merchant Shipping Act, 1854, can only arise when the services are rendered upon the very shore itself or within three miles thereof; here the hopper-barge at the time when she was rescued, was from two to three miles distant from the land. I think that the judgment of Dr. Lushington in *The Leda* (1) was right, and that the learned judge in the Court below was right; "on the shore" means "near the shore." The contention for the owner of the *Mac* as to this latter point wholly fails.

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BRETT, L.J. This case comes within the words of s. 458 of the Merchant Shipping Act, 1854, if they are read in their ordinary sense and without the assistance of the interpretation clause; but, as it seems to me, it falls also within that clause. In s. 458, the words "ship" and "boat" are used; but it seems plain to me that the word "ship" is not used in the technical sense as denoting a vessel of a particular rig. In popular language, ships are of different kinds; barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water built in a particular form and used for a particular purpose. In this case the vessel, if she may be so called, was built for a particular purpose, she was built as a hopper-barge; she has no motive-power, no means of progression within herself. Towing alone will not conduct her, she must have a rudder, and therefore she must have men on board to steer her. Barges are vessels in a certain sense; and as the word "ship" is not used in a strictly nautical meaning, but is used in a popular meaning, I think that this hopper-barge is a "ship." She is not propelled by oars. The interpretation clause of the Merchant Shipping Act, 1854 (s. 2), does not limit the meaning, it enlarges it. This hopper-barge is used for carrying men and mud; she is used in navigation; for to dredge up and carry away mud and gravel is an act done for the purposes of navigation. Suppose that a saloon barge capable of carrying 200 persons, is towed down the river Mersey in order to put passengers on board vessels lying at the mouth; she would be used for the purposes of navigation, and I think it equally true that the hopper-barge was used in navigation.

With regard to the second point, I am prepared to adopt the view of Dr. Lushington in *The Leda*. (1) The expression "on the shore," is a nautical phrase, and is used in an extended meaning; it is so used in Acts of Parliament. I do not think that the legislature intended that the phrase should be used in a literal sense.

COTTON, L.J. This appeal is brought on the ground that the justices had no jurisdiction to award salvage.

The first point is that the hopper-barge is not a "ship." The

(1) Sw. 40.

interpretation clause does not confine the meaning of the word, it does not confine it simply to what is used in navigation. I think that the hopper-barge is a "ship," both within and without the interpretation clause. "Ship" is a general term for artificial structures floating on the water; this is plain upon looking at the meanings given in Johnson's Dictionary; and it is to be observed that one of the meanings of "boat" is therein stated to be "a ship of a small size." I think that the proper meaning is "something hollowed out." Some expressions of Blackburn, J., in *Ex parte Ferguson* (1), may appear to support a different view; that learned judge seems at first sight to have been of opinion that a "ship" meant a sea-going vessel; but I think that the remarks which he made must be read with reference to the subject-matter before him, and that he was merely explaining that the vessel in question was a "ship." It is plain to my mind, that in order to be a "ship" within the Merchant Shipping Act, 1854, a vessel need not be sea-going: it is only necessary to refer to s. 19 of that statute which provides that British ships must be registered, except "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of such ships are resident." I think that this shews that the hopper-barge was a "ship" within the Act. The question cannot depend on the circumstance whether she carries a cargo from port to port. She was propelled by towing, and she carried mud with a crew on board.

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As to the second point, I think that the counsel for the owner of the *Mac* was justified in raising it; he was satisfied with the judgment which he had obtained in the Admiralty Division, and he could not appeal against the reasons assigned by the judge; but as to the merits he cannot succeed upon this point. I think that *The Leda* (2) was rightly decided. The 458th section of the Merchant Shipping Act, 1854, uses the words "stranded or otherwise in distress;" and this shews that the ship need not be touching the ground. In this case, the hopper-barge was within

(1) Law Rep. 6 Q. B. 280, at p. 291. .

(2) Sw. 40.

1882 three miles of the shore and was therefore near to it. The
THE MAC. justices, therefore, had jurisdiction.

Appeal allowed.

Solicitors for owner of the *Mac*: *Tompson & Co.*

Solicitors for owners of the *Saucy Polly*: *Whyte, Collison, & Pritchard.*

J. E. H.

July 4.

[IN THE COURT OF APPEAL.]

THE GUY MANNERING.

Damage—Pilot compulsorily taken on Board but not compulsorily in Charge
—Liability of Shipowner for Collision in Suez Canal solely caused by
Negligence of Suez Canal Company's Pilot.

Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal Company's pilot compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damage arising out of the collision.

The effect of the Regulations for the Navigation of the Suez Canal is to constitute a pilot taken on board a ship traversing the canal the adviser of the master, and to leave the control of the navigation of the ship solely with the master.

APPEAL by the defendants from the judgment of Sir R. Phillimore upon a special case.

The facts of the case are fully stated in the report of the proceedings in the Admiralty Division. (1)

Butt, Q.C. (Nelson, with him), for the defendants. The injury to the plaintiffs' ship was caused solely by the negligence of those on board the defendants' ship. The defendants were compelled by the Regulations for the Navigation of the Canal to employ a pilot, and he was de facto acting in charge of the ship. Under these circumstances the defendants are not liable. It is true that s. 388 of the Merchant Shipping Act, 1854, may not apply out of the United Kingdom; but it is only declaratory of the general law, and the defendants can rely upon the general principle that an employer is not liable for the acts of a subordinate whom he

(1) Ante, p. 52.

is forced to take into his service. The relation of masters and servant did not exist between the defendants and the pilot. The Regulations for the Navigation of the Suez Maritime Canal are in many respects *ultra vires*: they cannot alter the general rules of law. The authorities similar to the present case support the argument for the defendants. In *Lucey v. Ingram* (1) it was held that as a licensed pilot was on board, the owner was not liable for his negligence, although pilotage was not compulsory. A decision to the same effect may be found in *General Steam Navigation Co. v. British and Colonial Steam Navigation Co.* (2) The law of a foreign country as to a tort is not recognised in the courts of this country if it is contrary to English law: *The Halley*. (3) It is the licensed pilot, and not the owner of the ship, who is liable for the pilot's negligence: *M'Intosh v. Slade*. (4) The defendants contracted with the pilot to navigate their steamship through the canal: that pilot exercised an independent employment, and they are not responsible for the consequences of his negligence: *Milligan v. Wedge*. (5)

W. G. F. Phillimore (*Cohen, Q.C.*, with him), for the plaintiffs. The fallacy of the argument for the defendants lies in their interpretation of the word "pilot" as used in the Regulations of the Suez Canal; it there means only a guide and not a "pilot" in the ordinary sense of the word. The doctrine as to compulsory pilotage was discussed in *The Maria* (6) by Dr. Lushington; but it is plain that where the so-called "pilot" does not take upon himself the navigation of the vessel, but is a mere adviser of the captain, the owners are responsible if any injury is done by unskilful management.

Butt, Q.C., did not reply.

LORD COLERIDGE, C.J. This case has been well argued by the counsel for the defendants. Nevertheless, I am of opinion that the judgment of the Court below is correct, and I need only say that I agree with the reasons on which that judgment is founded.

(1) 6 M. & W. 302.

(3) Law Rep. 2 P. C. 193.

(2) Law Rep. 3 Ex. 330; in Ex. Ch.

(4) 6 B. & C. 657.

4 Ex. 238.

(5) 12 A. & E. 737.

(6) 1 Wm. Rob. 95.

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BRETT, L.J., I am of the same opinion, and I also agree with the reasons assigned by the judge in the Court below. It is said by the defendants' counsel that as the captain allowed the pilot to act, the owners of the *Guy Mannering* are not liable, and, further, that the limitation of the pilot's authority is *ultra vires*. I see no reason for upholding the argument as to the latter point. The regulations for the navigation of the Suez Canal must be taken to be a part of the law of the country; and no facts are stated by which they can be impeached. It is said that the pilotage is compulsory, and that a shipowner is not liable for the acts of the pilot, whom he is compelled to employ. In England the shipowner is not liable for the acts of the pilot, where pilotage is compulsory: the statutes as to merchant shipping do not accurately define the duty of a pilot; but it is plain that he is to conduct the navigation. On the one hand he has no power to place the crew at particular posts in the ship or to regulate the discipline: on the other hand he is to regulate the course of the ship through the water; he is taken on board in order to control the management of her for this purpose: a sailing vessel cannot be steered unless her sails are regulated in a particular manner; and therefore he has power to regulate the management of the sails. The owner of the ship is not liable for the consequences of the wrongful or negligent acts committed by the pilot, whom he is compelled to employ. But if the ship goes wrong in consequence of a failure of duty by the look-out man, it is not the fault of the pilot and the owner is responsible. If the pilot's orders as to steering the ship are not obeyed, and if mischief in consequence ensues, the owner cannot escape from liability. It may be that when the owner of the ship is compelled to take a pilot on board, and is compelled to pay him fees for the whole of a certain distance, he is protected from all the consequences of the pilot's negligence wherever they may happen, although during part of the distance pilotage is not compulsory; in fact, obligatory payment to a pilot may be deemed to stand on the same footing as the compulsion to take him on board: and this doctrine explains one of the grounds upon which *General Steam Navigation Co. v. British and Colonial Steam Navigation Co.* (1) was

(1) Law Rep. 3 Ex. 330; in Ex. Ch. 4 Ex. 238.

decided; it was there held, that as a pilot taken on board for the distance between Dungeness and London could claim payment for his services as far as Gravesend, the owner was not liable for his negligent acts even after the ship had entered the limits of the port of London, to which she belonged, and in which the employment of a pilot was not in her case compulsory. *Lucey v. Ingram* (1) always seems at first sight a stumbling-block, but it was decided on the ground that the legislature had intended under the circumstances of that case to exempt the owner from liability. It has been argued that the relation of masters and servant did not exist between the owners of the *Guy Mannering* and the pilot, and that the doctrine as to the exemption of owners where pilotage is compulsory, must be always upheld in English Courts; but all theory fails to assist the defendants, because the duties performed by a pilot of the Suez Canal Company are not the same as those of an English pilot. He does not take the control of the course of the ship: he is not bound to direct how she is to be navigated. In the words of Article 4 of the Regulations for the Navigation, "pilots place at the disposal of captains of vessels their experience and practical knowledge of the canal;" that is to say, a pilot is to tell a captain of the condition, the formation, and the depth of the canal; he is in fact to be a kind of living chart. But a pilot is not to go beyond this: the captain must direct how the ship is to be steered and the whole duty of managing her devolves upon him. In the words of Article 4, "the captain is held responsible for all groundings and accidents of whatsoever kind resulting from the management and manœuvring of his ship." The captain of the *Guy Mannering* was in fault, for he misconstrued his own powers. He thought that he was in the same position with regard to the pilot as an English captain is when he is compelled by English law to employ a pilot.

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COTTON, L.J. The ground of the present appeal is that at the time of the accident the employment of a pilot was compulsory. By the English law, the owner of a ship is not liable for the negligence of a pilot whom he is compelled to employ; and the

(1) 6 M. & W. 302.

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reason is that the pilot is not the servant of the owner. In some of the sections of part 5 of the Merchant Shipping Act, 1854, such as ss. 359, 362, 388, a pilot is said to "have charge" or to "take charge," or to be "acting in charge;" this language seems to shew that in the opinion of the legislature, when a pilot comes on board, he takes the management of the vessel; in fact, the management of the vessel passes out of the hands of the captain; and therefore it is only reasonable that when pilotage is compulsory, the owner should not be liable for the negligence of the pilot. But how does that principle apply here? The duties of a pilot on the Suez Canal are prescribed by the regulations of the company, and these declare that when an accident of whatsoever kind happens, the captain is to be responsible. The reason, as stated in Article 4 of the Regulations, is as follows: "Pilots place at the disposal of captains of vessels their experience and practical knowledge of the canal; but as they cannot be specially acquainted with the defects or peculiarities of each steamer and her machinery in stopping, steering, &c., the responsibility as regards the management of the ship devolves solely upon the captain." It is not a part of the pilot's duty to direct the management of the ship whilst passing along the canal; if any accident happens through a mistake of the pilot, it cannot be said to occur through the default of the person in charge: the pilot has not the control of the vessel: the captain has the control, and is the person in charge. I cannot think that the rules of the company are *ultra vires*; upon the facts before us, we must assume that they have been made pursuant to a competent authority.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Lowless & Co.*

J. E. H.

[IN THE COURT OF APPEAL.]

1882

May 26,

THE GAETANO AND MARIA.

Bottomry—Foreign Ship—Law of the Flag.

The owner of cargo who ships it on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag, that is the law of the country to which the vessel belongs, unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond made by the master of a foreign ship hypothecating cargo laden on board such ship, if valid according to the law of the flag of the ship, will be enforced by the English Admiralty Court, on the arrest of the ship and cargo at the Port of London (the port of discharge within the meaning of the bond), although the conditions imposed by English law as essential to the validity of such bond have not been complied with.

10 QBD
524
8 PD 211

APPEAL by the plaintiffs the indorsees of a bottomry bond, from the judgment of Sir Robert Phillimore, the judge of the Admiralty Division, on a demurrer by the defendants to the 4th and 5th paragraphs of the plaintiff's reply. (1)

By the statement of claim the plaintiffs alleged that in the month of April, 1881, the Italian vessel *Gaetano and Maria* was at the Island of Fayal, in the Azores, in distress laden with cargo bound on a voyage to London, and her master, Giovanni Frugoni, being without funds or credit at Fayal, was compelled to borrow on bottomry of the said ship her cargo and freight the sum of 2330*l.* 2*s.* 7*d.* for the necessary disbursements and expenses of the said ship and cargo to enable her to proceed on her said voyage.

That on the 22nd of April, 1881, the said master (who was a part owner of the *Gaetano and Maria*) by a bottomry bond dated on that day, and by him duly executed in consideration of the sum of 2330*l.* 2*s.* 7*d.* lent to him by Antonio Silveira d'Avila Coeltro bound himself and the said ship, her tackle apparel and furniture, her cargo, and the freight to be earned by her on her said voyage, to pay to the said Antonio Silveira d'Avila Coeltro or his order the said sum of 2330*l.* 2*s.* 7*d.* sterling, together with the maritime premium thereon upon the safe arrival of the said

(1) Ante, p. 1.

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ship at her port of discharge with a proviso that the bond was not to be enforced till three days after arrival.

That the said bottomry bond was endorsed by the said Antonio Silveira d'Avila Coeltro to the plaintiffs, who were the lawful owners thereof.

That the *Gaetano and Maria* subsequently proceeded on her said voyage, and on the 15th of May, 1881, arrived with her cargo on board at the port of London, which was her port of discharge within the meaning of the said bond.

The owners of the cargo appeared as defendants in the action, and delivered a statement of defence, in which, after stating that they were domiciled in England, and after denying the power or authority of the master of the said vessel to bind them by any such bottomry bond, they alleged in the 6th paragraph as follows:—

6. These defendants further in the alternative say that the said master of the said vessel at the time of his arrival at Fayal was aware that the said cargo was shipped by Messrs William H. Power & Co., of New York, and that the ship was chartered for the said voyage by Messrs. Rodocanachi, Sons, & Co. of London. There was postal and telegraphic communication with England and the United States of America, and the said master did not communicate to the owner of the said barque or to the said shippers or to the said charterers of the said vessel, as he might and could have done, his intention to hypothecate the said cargo or the circumstances which might render such hypothecation advisable or necessary, or take any steps to ascertain who were the actual owners of the said cargo, but on the contrary, without reasonable cause or excuse, abstained from so doing when communication should have been made, and these defendants further say that the said shippers did not know, nor did they the said defendants know of the said bond till the arrival of the said vessel at Falmouth, and that the said bond is bad and invalid against the said cargo.

The 4th and 5th paragraphs of the plaintiffs' reply were as follows:—

4. And by way of further reply to the several allegations in the said 6th paragraph of the statement of defence, the plaintiffs say

that by the law of Italy to which country the *Gaetano and Maria* belonged at the time that the bottomry bond in question was executed, and at the time when it became due, the bottomry contract had to be entered into, and the said bottomry bond had to be executed as they, in fact, were in the presence and with the intervention and sanction of the Italian consul or consular agent at the port of Fayal, and that upon their being so entered into and executed, they became and were valid and effectual to bind both ship and cargo without any previous communication being made by the master to the owners of the ship or to the owners of the said cargo.

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5. In the alternative the plaintiffs say in answer to the allegations in the same paragraph that, by the law of Italy to which country the *Gaetano and Maria* belonged at the times aforesaid, a bottomry contract can be lawfully made, and a valid bottomry bond can be executed without any previous communication with the owners of ship or the owners of cargo, and that all the formalities and conditions required by the Italian law in order to make a good and valid bottomry bond were complied with and satisfied before the said bottomry bond was executed.

The defendants demurred to the said 4th and 5th paragraphs of the reply.

SIR ROBERT PHILLIMORE being of opinion that the case was governed by that of *The Hamburgh* (1), and that the validity of the bottomry bond was not to be determined by the law of the ship's flag, gave judgment on the demurrer for the defendants.

The plaintiffs appealed.

May 11. *C. Hall, Q.C.*, and *W. G. F. Phillimore*, for the plaintiffs. It must be admitted that according to the law of England the master would have had no authority to hypothecate the cargo, if he had the means at the foreign port of first communicating with the cargo owners and neglected to avail himself of such means; but the question here is whether the cargo having been shipped on a foreign ship, the law of the country of that ship is not to prevail rather than the law of England in determining the validity of the

(1) Br. & Lush, 253.

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bottomry bond. That question was really not considered by Dr. Lushington in *The Hamburg* (1), as there was no sufficient evidence there to raise it. "I am well aware," says Dr. Lushington in that case, "that much has been said upon this subject, and that many questions have been discussed, whether the law of the country of the vessel ought or ought not to prevail, and also whether the *lex loci contractûs* ought not to be the governing principle. I abstain, however, from going into these questions, and for the following reasons. In the case of *The Gratitude* (2), an imperial vessel, in that celebrated judgment where Lord Stowell exhausted all the authorities, not a word is said nor any authority cited to shew that any law should be applied to the case save the ordinary maritime law. There is nothing mentioned of the *lex loci contractûs*, nor of the law of the country to which the ship belonged. The same observation applies to the case of *The Bonaparte* (3), a Swedish vessel, and to many other cases. In this case, therefore, and for the present, I must take as my guide the ordinary maritime law. The state of the pleading also is so vague, and the evidence so loose and unsatisfactory, that I can take no other course. Whenever any specific law is averred to be the governing law, with sufficient distinctness and proper evidence produced, I shall be ready to consider the question." The Privy Council on appeal in that case simply agreed with Dr. Lushington as to this. Now on the demurrer in the present case the law of Italy, the country to which the vessel belonged, is clearly stated, so that the point is raised here. *Lloyd v. Guibert* (4) is a strong authority in favour of the plaintiffs, as shewing that the law of the flag must govern the rights of the parties. It is true that that was with reference to the contract of affreightment, but the principle is the same as that by which authority is given by a cargo owner to the master of the vessel to bind the cargo by a bottomry bond. The case of *The Karnak* (5) also decides that the extent of the authority conferred on the master of a vessel to bind the owners either of the ship or cargo, is derived from and governed by the law of the flag. To the same effect is *Pope v. Nickerson*. (6)

(1) Br. & Lush. 253.

(2) 3 Ch. Rob. 240.

(3) 8 Moo. P. C. 459.

(4) Law Rep. 1 Q. B. 115.

(5) Law Rep. 2 P. C. 505.

(6) 3 Story, 465.

The case of *Kleinwort, Cohen, & Co. v. The Cassa Marittima of Genoa* (1), which was relied on in support of the demurrer, never raised the question whether the law of the flag should prevail, but only decided what is not disputed to be the English law, that the master cannot hypothecate the cargo without communicating with the owner of it if such communication be practicable. The question, by what law the master had authority to sell the vessel at a foreign port, was considered by Dr. Lushington in *The Eliza Cornish*. (2)

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Butt, Q.C., and *Myburgh, Q.C.*, for the defendants, the owners of the cargo. "In no instance has a bottomry instrument been held valid by a Court of this country, except where the requirements of the law of the tribunal have been complied with:" 1 Maude & Pollock's Law of Merchant Shipping, 4th ed. p. 570. The proposition on the part of the plaintiffs is not to construe a contract by the Italian law, nor to apply that law to an existing contract, but to make a contract by virtue of that law, where the parties are English and where the Court to give force to it is an English Court. By the English law the master would not be the agent of the defendants and authorised by them to enter into this bottomry bond except by necessity; and where there was power within a reasonable time for the master to communicate with the cargo owners there would be no such necessity, and consequently no authority to act as agent for the cargo owners.

[LORD COLERIDGE, C.J. Lord Stowell in *The Gratitude* (3) points out the difficulty of the master getting the directions of the cargo owners in the case of a general ship, where the cargo may be owned by different persons.

COTTON, L.J. Do you say that the right to bind the cargo owner by a bottomry bond must depend on the law of the country of such owner?]

No. The law of the port of discharge where the bond is payable is the law to govern the rights of the parties, and that here was the English maritime law. The power to make the contract to bind the cargo owner must depend on the fact of necessity which must be proved, and that is a matter of evidence and must

(1) 2 App. Cas. 156-7.

(2) 1 Spinks Ec. & Ad. 36.

(3) 3 W. Rob. 240, at p. 262.

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therefore be according to the *lex fori*: *The Halley*. (1) So according to Story's Conflict of Laws, sec. 242, the law of the place of performance is to govern. Moreover, where the English Admiralty Court is applied to in order to enforce a lien, it may well refuse to lend its aid for that purpose, except to enforce it according to the English law. Here the charterparty was made in London.

[COTTON, L.J. That does not appear on the pleadings, and one cannot look to anything which is not stated there.]

[*W. G. F. Phillimore*. There is no objection to the pleadings being mended in this respect. (2)]

Then as there is here a contract of affreightment made in London where the cargo is to be delivered, surely the validity of the bottomry bond must be determined by the law of the port of London, which is the port of discharge where the bond is to be enforced.

W. G. F. Phillimore replied.

Cur. adv. vult.

May 26. BRETT, L.J. This is a case which I regret to say arises on demurrer, for I would much rather that it had arisen on the facts as proved. I think, however, that we must take the facts to be that goods were shipped by the defendants, who whether British subjects or not are domiciled in England, and that such goods were shipped abroad on board an Italian ship in fulfilment of a charterparty which was made in London, and for the purpose of being carried to England; that the ship met with misfortune and was taken into Fayal, a Portuguese port, and whilst in such Portuguese port the master entered into a contract of bottomry by which he hypothecated the ship and the cargo; that the vessel and the cargo afterwards arrived in England, and that the ship and cargo were arrested in the English Admiralty Court. It was asserted in the statement of defence that there were means of communication between Fayal and England of such a kind that the master might, if he had so pleased, have communicated with the owners of the cargo before he thus hypothecated their cargo,

(1) Law Rep. 2 P. C. 193.

(2) By consent the pleadings were to be taken as amended by a state-

ment in them that the charterparty was made in London.

and this, by the pleadings in reply, is not denied. But it is stated that according to Italian law, even though he could have thus communicated, yet he was entitled under the circumstances to hypothecate the cargo or to cover it by a bottomry bond, if he did so before the consul, which he did do in this case. And it is in effect further stated that although there were these means of communication, yet, that by the Italian law the master of a vessel may cover the cargo by a bottomry bond without communicating with the owner under certain conditions, all of which conditions were fulfilled in this case.

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The demurrer therefore raises this question, whether although there were the means of communication before the bottomry bond was executed, yet nevertheless the defendant's goods are bound in the English Admiralty Court by that bottomry bond so entered into by the master.

Now the first question raised on the argument before us was what is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt. Every Court of Admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law; and about that I cannot conceive that there is any doubt. It seems to me that this is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him, and Dr. Lushington after him), and I do not understand that the present learned judge of the Admiralty Court differs in the least from them. He says that this case must be determined by the general maritime law as administered in England—that is in other words by the English maritime law.

Now if this ship had been an English ship, if the captain had been an English master, and if the owners of the cargo had been

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English subjects, there is no doubt that the master would have had no authority to bind the owners of the cargo unless certain necessities had arisen. The ship must have been in a state of distress, and in a port of distress where the owner of her had no means or credit by which to find the money required for doing the necessary repairs, and besides this in order to require the hypothecation by bottomry of the cargo, the value of the ship must not of itself be large enough. Moreover, if this had been an English ship, and an English captain, even though all these necessities had existed, yet the master would not be authorised to charge the cargo if before doing so he had the means of communicating with the owner of the cargo within a reasonable time, so that on receiving notice the owner of the cargo might determine whether he would allow the cargo to be bottomried or whether he would take other means for the disposal of the cargo.

Therefore if this had been an English ship, there can be no doubt but that the cargo of the defendants would not on the facts pleaded in this case have been liable; because it is admitted that before hypothecating the cargo a communication might have been made by the captain to the cargo owners.

Now it is alleged that this rule must bind the plaintiffs, although the ship is an Italian ship, because it was said that the matter to be proved was, whether there was a necessity which gave the captain a right to hypothecate the cargo in this way, and that inasmuch as that is a matter of procedure it is to be governed according to the law of the forum. That raises the question whether this is a matter of procedure. It is said it is, because it is a matter of evidence. Now the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are the matters with which the procedure has to deal. Here the facts, which are to be proved in order to give the captain the authority, are not the evidence of those facts. The thing to be proved cannot be evidence of the thing which is to be proved, and therefore it seems to me that this is not a matter of procedure to be governed by the law of the forum.

Then arises this consideration. What is the nature of that which has to be proved? It is the authority of the master.

There is no contract between the master and the owner of the cargo which enables the master to deal with the cargo; but there is a contract between the owner of the ship and the owner of the cargo with which I will presently deal.

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I doubt myself (but it is not necessary to decide it in this case) whether the master is ever the agent of the owner of the cargo. The master is the agent of the owner of the ship, and it may be that the master, as agent of the owner of the ship, has certain rights with regard to the cargo. But suppose that the master can be under circumstances of necessity the agent of the owner of the cargo, out of what does the authority of the master arise? Now this authority of the master of the ship to hypothecate the ship or cargo is peculiar. It does not arise merely out of a contract of bailment, for that contract gives no such right. It does not arise even out of a contract of carriage on land. I doubt whether it arises on a contract of sea carriage, where it is all within the realm, but it is not necessary that this should be now decided. It does arise where goods are shipped on board a ship to be carried from one country to another. That is acknowledged by the maritime law of England, and, as far as I know, is equally acknowledged in every maritime country. It arises from the necessity of things; it arises from the obligation of the shipowner and the master to carry the goods from one country to another, and from it being inevitable from the nature of things that the ship and cargo may at some time or other be in a strange port where the captain may be without means, and where the shipowner may have no credit because he is not known there, that for the safety of all concerned and for the carrying out of the ultimate object of the whole adventure, there must be a power in the master not only to hypothecate the ship but the cargo. That power of the master does not arise out of the bill of lading nor out of the charterparty, because it may exist where there is neither bill of lading nor charterparty. It arises out of the contract of maritime carriage, by the shipment of goods on board a ship for the purpose of being carried from one country to another, and it exists the moment the goods are put on board for such a purpose. It is regulated, and often limited, by terms in the bill of lading or by terms in the charterparty; but unless such terms

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specifically do away with this authority of the master, the authority of the master exists by virtue of the contract which arises between the shipowner and the cargo owner by the shipment of the goods. It is not necessary to decide whether this authority is given to the master by way of contract or by means of the law.

Then what is the principle which ought to govern this case? The goods are put on board an Italian ship, and the person to exercise authority is an Italian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when that law is contrary to the law of his own country? Why should it? Is the master of a ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master on board an Italian owner's ship, what is the meaning of the transaction, but that he is to deal with the goods as an Italian master is to be taken to deal with goods on board his ship, unless he is bound to another mode? Upon principle it seems to me that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary. Therefore, when these goods were shipped on board the Italian ship, it seems to me that by the contract of the parties arising out of that shipment it must be taken that the goods were to be dealt with under circumstances which might arise and which are generally considered likely to arise by all maritime countries, in the way in which that master would deal with the goods according to the law of Italy, unless there was some stipulation to the contrary. Now that is how it stands on principle. How are the authorities? The case of *Lloyd v. Guibert* (1) does not seem to me to govern this case absolutely, because the question there was whether or not a certain stipulation was implied in a contract. The contract was a contract of affreightment and the question was whether there was to be implied into that contract a stipulation that if certain circumstances arose, and the master delivered up his ship and freight, the shipowner should not be made liable beyond the amount specified. The owner of the ship could only

(1) Law Rep. 1 Q. B. 115.

be relieved if there was such a stipulation in the contract of affreightment. There would have been no such stipulation if it was to be judged according to the law of the forum, that is, the law of the English Court. But there would be such a stipulation if the contract of affreightment was to be construed according to the law of the ship. It was there held that inasmuch as the contract of affreightment was made with the master or owner of a foreign ship abroad, the contract was the contract of the country of the ship; in other words, that it was governed by the law of the "Flag" of the ship, and inasmuch as in the country of that flag such a contract of affreightment would have had such a stipulation in it, then the English Court would hold that it had this stipulation in it. That is not this case, because the matter here is not the question of the construction of a contract, but of what authority arises out of the fact of a contract having been entered into. Still, if the contract was held there to be a foreign contract, because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorise our saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master; and in accordance with that principle I think this case ought to be decided. The learned judge of the Admiralty Court considered that this case was governed by *The Hamburg* (1), but with great deference I do not think that that case ought to govern the present one at all. There, Dr. Lushington treated the ship as an English ship, and said that he was administering the maritime law of England. It was urged upon him that he ought to administer some other maritime law, but his answer was, "I do not judge what it should be, if there had been any evidence before me that the maritime law of some other country was different from the law of England, but no such evidence has been given before me in this case." This point, therefore, did not arise there, and neither Dr. Lushington nor the Privy Council on appeal, decided if the law of the countries had been different in the case of *The Hamburg* (1) which law would have been administered. I cannot therefore think that the case of *The Hamburg* (1) is in conflict with the

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(1) Br. & Lush. 253.

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decision to which I have come in the present case, nor in conflict with the case of *Lloyd v. Guibert*. (1) Therefore, acting upon the principle of *Lloyd v. Guibert* (1), and upon the principle which arises from the mercantile transaction itself, it seems to me that whoever puts his goods on board a foreign ship puts them on board subject to be dealt with by the master according to the law of the country to which the ship belongs, unless that authority is limited by express stipulation between the parties at the time of the shipment.

There was another and a minor point taken which was that if that be the law yet it was not the law to be administered in this case, because the contract of affreightment here was actually made in England. But that makes no difference in my view of the case; the right arises out of the contract which is instituted by the shipment, and which is not controlled in this respect by any stipulation in the bill of lading or in the charterparty. I am therefore of opinion that the demurrer in this case ought not to have been allowed, and that the rights of the parties ought to be decided according to the law of the flag.

COTTON, L.J. The question in this case is as to the validity of the bottomry bond against the owners of the cargo in the ship. According to the English law with reference to the facts of this case notice ought to have been given to the cargo owners, but there is a statement in the reply that, according to Italian law, it was not necessary that such notice should be given in order to make the bond valid, and that the ship was an Italian ship.

The question therefore which we have to consider is whether the English law or the Italian law is to determine the validity of the bond?

The point turns not on the express terms of any contract, but, in my opinion, on an implied authority arising out of the contract between the owners of the cargo and the owner of the ship when the goods were put on board for the purpose of being carried; and, like all other implied terms, it must be governed by the law applicable to the country in which it is implied. It was said that necessity gives the authority to hypothecate. In my opinion

(1) Law Rep. 1 Q. B. 115.

that is putting it wrongly. Necessity is the condition of the exercise of the authority; but, in my opinion, the implied authority arises out of the contract and is not properly given by necessity. Now what law must govern it? It was said that it must here depend upon the *lex fori*, and that as I understand for two reasons. First, it was said that the remedy to be given depends upon the *lex fori*. Undoubtedly it does. But we are not considering here what is the proper remedy, but whether the bottomry bond is valid or not? Secondly, as pointed out by Lord Justice Brett, it cannot be considered to depend upon the *lex fori*, because the proof of the necessity, which is the condition precedent to the exercise of the authority, is a matter of procedure. The mode of proving the facts to shew the existence of the necessity is part of the *lex fori*, and depends upon the *lex fori*, but the facts necessary to establish the right of the party are not the evidence to prove such facts, and the facts as distinguished from the way in which they are to be proved, are not part of the *lex fori*. Next it was said that the authority to hypothecate must depend upon the place where the contract was made, and it was put in two ways. It was said that as a rule the law of the place where the contract is made was to be implied as to all those matters which are not in express terms in the contract, subject to this, that where the contract is made in one place to be performed in another, the law of the place of performance was to govern. Here the place of performance was said to be England, because the goods were to be carried there. But this really is a fallacy. The performance of the contract is not merely the landing of the goods in England. They are taken on board to be ultimately landed no doubt in England; but what law of the numerous countries to which the goods may be taken during their carriage to England is to be implied? In my opinion the rule stated by Lord Justice Brett, in the absence of authority, would be the right one,—that when the owner of goods puts them on board a vessel he must authorize the owner of that vessel, and his agent the captain, to deal with those goods according to the law of the country to which that vessel belongs, and therefore if, as it was here, an Italian ship according to the law of Italy. The rule is applicable because no one who ships goods on board a vessel can

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be ignorant of the flag, that is, of the country to which the ship belongs, whilst the master would be in a very difficult position if he had to inquire what was the law of the country of the goods, if, as regards one portion of the cargo, he had the power to deal with it when the necessity arose, in one way, and as regards another portion of the cargo, in another way.

In my opinion the rule stated by Lord Justice Brett, to which I have referred, is a sensible rule and one that should be adopted if there were no authority upon the subject, but I think there is authority given by express decision; because I think *Lloyd v. Guibert* (1) leads to the conclusion expressed by Lord Justice Brett, and in which I concur. The Court below decided this case on the authority of *The Hamburg* (2), but certainly Dr. Lushington, as I understand his judgment in that case, expressly says that he does not intend to decide this question. What he says is this: "The state of the pleading is so vague, and the evidence so loose and unsatisfactory that I can take no other course. Whenever any specific law is averred to be the governing law with sufficient distinctness and proper evidence produced, I shall be ready to consider the question." That shews that he thought that in that case he was not considering the question, and certainly not deciding it in a way inconsistent with the conclusion at which we have arrived.

I may say that the Lord Chief Justice has told us that he concurs in our decision.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Thomas Cooper & Co.*

(1) Law Rep. 1 Q. B. 115.

(2) Br. & Lush. 253.

[IN THE COURT OF APPEAL.]

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June 21.

THE DOUGLAS.

Damage—Collision caused by Vessel approaching the Spot where Navigation of River rendered Dangerous by sunken Vessel—Vessel sunk by Collision for which her Owner alone to blame—Negligence—Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16), s. 4—Act done in course of Duty—Warning to Harbour-master—Hearsay Evidence—Wrongful Rejection of Evidence.

The *D.* in consequence of the sole default of her master and crew had sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel without any fault on the part of those on board her came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the *D.*, the judge at the trial refused to admit the evidence shewing that the mate of the *D.* had sent a message to the harbour-master, and that the latter had promised to light the wreck:—

Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done.

THIS was an action of damage brought by the owner of the steamship *Mary Nixon* against the steamship *Douglas* and her freight.

The statement of claim alleged that shortly after midnight on the 27th of October, 1881, the *Mary Nixon* was proceeding up the river Thames about mid-channel in Gravesend Reach with her regulation lights exhibited and a proper look-out, when she struck against one of the masts of the *Douglas* as that vessel was lying a sunken wreck in a position obstructing the navigation of the river, and thereby suffered considerable damage; that the collision was not contributed to by any negligence on the part of those in charge of the *Mary Nixon*, whilst no lights or warning of any sort were exhibited on or near the wreck of the *Douglas*, and there was nothing to warn those on board the *Mary Nixon* of the wreck. The statement of claim further alleged that it was by reason of the negligence of those in charge of the *Douglas* in coming into collision with two vessels called respectively the *Duke of Buckingham* and the *Orion*, that the *Douglas* sank in the position she lay

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in when the *Mary Nixon* came into collision with her, and attributed negligence to the defendants, the owners of the *Douglas*, for not taking means to warn approaching vessels of the position of the wreck.

The defendants delivered a statement of defence, and therein, after admitting that the *Douglas* had sunk in consequence of a collision with the *Duke of Buckingham*, and that that collision had been caused by the negligent navigation of the *Douglas*, but alleging that afterwards a white light had been placed in the main rigging of the *Douglas* and remained there until the *Douglas* sank, raised the defence that after the *Douglas* sank and before the *Mary Nixon* struck upon the wreck a reasonable time to exhibit lights as a warning in or near the wreck had not elapsed, that the *Mary Nixon* had been sufficiently warned of the position of the wreck by hailing; and in the alternative that "at the time when the *Mary Nixon* struck the *Douglas*, the *Douglas* was a wreck lying sunk on the bed of the river Thames, and that before and at the time when the *Mary Nixon* struck the *Douglas*, the defendants had wholly ceased to have the possession, management, or control of the same."

April 18. The action was heard before the judge of the Admiralty Division, assisted by two of the Elder Brethren of the Trinity House.

Witnesses were examined on behalf of the plaintiff and of the defendants. From the evidence of the witnesses it appeared that the *Mary Nixon* had struck the wreck of the *Douglas* about six hours after the *Douglas* had sunk, and that at that time the officers of the Thames Conservancy had not taken possession of her.

It was proposed to be proved on behalf of the defendants by the evidence of the captain of a tug called the *Endeavour*, that warning was given to the harbour-master at Gravesend, and that the harbour-master said that the proper wreck-lights would be immediately sent to the *Douglas*, and that the statement of the harbour-master was reported to one of the officers of the *Douglas*. This evidence was objected to by the plaintiff on two grounds: first, that it was hearsay evidence; and secondly, that it was

immaterial, inasmuch as the defendants could not delegate the duty of guarding the wreck to the harbour-master. The Court rejected the evidence on its being tendered. It appeared, however, from the examination in writing of Griffith Williams, the mate of the *Douglas*, that he instructed the master of the tug called the *Endeavour* to report the sinking of the *Douglas* to the harbour-master, and that shortly afterwards the captain of the *Endeavour* reported to him that the harbour-master had said that he would send down something in the course of an hour. It further appeared from the defendants' answers to interrogatories, that they had never abandoned their interest or ownership in the *Douglas*, and that they still claimed to be her owners. The other facts are sufficiently noticed in the judgments hereafter set out.

Butt, Q.C., and *G. Bruce*, for the plaintiff. The *Mary Nixon* would never have struck the wreck, if the *Mary Nixon* had been warned of the position of the wreck in sufficient time for her to avoid running into it; the duty of warning the *Mary Nixon* clearly lay on the defendants, as the sinking of the *Douglas* was brought about solely by the negligence of their own servants: *Brown v. Mallett* (1); *White v. Crisp* (2); *Harmond v. Pearson*. (3) In these circumstances the defendants must be held to be alone to blame for the damage done to the *Mary Nixon*. At the time the damage was done they had not abandoned the possession or management of the wreck, and it was incumbent on them after the *Douglas* had sunk "to use reasonable skill and care to prevent mischief to others," just as much as it was their duty to do so when this vessel was afloat. It is not as if it had been impracticable for the defendants to place a light near the wreck, or otherwise to warn the *Mary Nixon* of her danger.

Myburgh, Q.C., and *Bucknill*, for the defendants. At the time of the accident to the *Mary Nixon* the defendants had not the power of exercising and were not in fact exercising any possession, management, or control over the wreck of the *Douglas*, and if any duty then existed under which a light ought to have been placed to mark the position of the wreck, it was a duty to be performed

(1) 5 C. B. 599.

(2) 10 Ex. 312.

(3) 1 Campb. 515.

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Butt, Q.C., in reply.

Cur. adv. vult.

April 25. SIR ROBERT PHILLIMORE. This is an action for damages in consequence of a collision between the screw steamship *Mary Nixon* and another screw steamship called the *Douglas*. It occurred in Gravesend Reach at midnight on the 27th of October, 1881. The *Douglas* had previously come into collision with the steamship the *Duke of Buckingham*, and had in consequence sunk. It is admitted that the collision with the *Duke of Buckingham* was due to the negligent navigation of the *Douglas*. At the time of the collision between the *Mary Nixon* and the *Douglas*, the *Douglas* was lying sunk in the river about mid-channel with one of her masts above the water. The contention of the *Mary Nixon* was that it was the duty of the *Douglas* to warn approaching vessels of the wreck, and that no such warning was given, and therefore that she was responsible for the damage. The defence of the *Douglas* is that a white light was placed in her main rigging within a reasonable time; that the *Mary Nixon* was warned by hailing from another vessel in sufficient time to enable her to avoid the *Douglas*, and, as an alternative defence, that the defendants had wholly ceased to have possession, management, or control of the *Douglas*, and therefore were not responsible.

To deal first with the facts, I am of opinion that no hailing on the part of the *Douglas* is proved. I have consulted the Trinity Masters, and I agree with them that a reasonable time had elapsed between the collision with the *Duke of Buckingham* and the collision with the *Mary Nixon* for giving some warning to approaching vessels of the position of the *Douglas*, and that the means of such warning could have been obtained without difficulty. It appears that a light was put up in the main rigging of the *Douglas* after the collision with the *Duke of Buckingham*, which light remained till the *Douglas* sank; but at the time of the collision with the *Mary Nixon* no light appears to have been exhibited and no kind of warning given. I have now to deal with the question of law arising on these facts. The plaintiff contends that the *Douglas*

having had her lights knocked out by the previous collision, was bound to adopt some measures of warning, by lights or otherwise, to approaching vessels. The defendants say that no persons being left on board the *Douglas*, it was not the duty of any private person to give such warning, but that it became a matter for the intervention of public authority; that during the period between the crew leaving the ship and the intervention of the public authority the risk, however great, must be borne by the public; that in this case, although there was an *animus revertendi*, still the control and possession of the ship had been given up. I confess I listened to this argument with great alarm. The consequences of such a doctrine are fraught with danger to the interests of navigation and also to human life. It is, however, not necessary, in the view which I take of this case, to decide the exact point when the private obligation ends and that of the public authority begins. Two cases were relied upon: *Brown v. Mallett*, decided in 1848 (1), and *White v. Crisp*, decided in 1854. (2) The principle of law applicable to cases of this description appears to me to be contained in the judgment of Alderson, B., in *White v. Crisp* (2), citing the opinion of Maule, J., in *Brown v. Mallett* (1), in which it is laid down that "it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others." And he adds that this liability "is the same whether his vessel be in motion or stationary, floating or aground, under water or above it." Now in my opinion it has been proved that the possession, management, and control of the *Douglas* was not abandoned by her master and crew, and, consequently, that the duty, which Alderson, B., referred to in the passage that I have quoted, continued a duty on their part up to the time of the collision with the *Mary Nixon*. I must therefore pronounce that the *Douglas* is alone to blame for the collision with the *Mary Nixon*. (3)

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The defendants appealed.

(1) 5 C. B. 599.

(2) 10 Ex. 312.

(3) The 9th Article of the by-laws

for the Regulation of the Navigation of the River Thames, approved by Order in Council of the 18th of March, 1880,

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Bucknill, for the defendants. The evidence as to the message sent by the mate of the *Douglas* to the harbour-master at Gravesend was wrongly rejected: it was admissible as tending to disprove negligence on the part of those representing the defendants.

Butt, Q.C., and *G. Bruce*, for the plaintiff. The conversation between the harbour-master and the captain of the tug *Endeavour* was not admissible: it was merely hearsay evidence. And, further, it was immaterial. The captain and the mate of the *Douglas* could not delegate their duty to take proper care of the wreck to the harbour-master; they did not on behalf of the defendants abandon it. It is not the harbour-master's duty to take possession of the wreck; he is merely authorized to remove it. The defendants were as much bound to light the wreck as if they had contracted to do so: a legal duty was imposed upon them. They were guilty of causing an obstruction in a navigable river by leaving the wreck in it, and it does not appear that the harbour-master affixed lights to the wreck. The defendants certainly gave no notice to the plaintiff's vessel where the wreck was lying. It is true that by the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), ss. 86, 87, power was given to the conservators to remove vessels obstructing the navigation of the river, and by the Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16), s. 4, a conservancy authority "may" remove any vessel that is sunk, stranded, or abandoned, and "may" light or buoy her until removal; but the powers conferred by the latter Act are merely permissive, and not obligatory, and some delay must take place even if the conservancy acted under the power of this statute. It is no defence that the harbour-master was asked to put up a light on the wreck.

[BRETT, L.J. The Removal of Wrecks Act, 1877, relates to the performance of a public duty. Is not the word "may" in s. 4 to be read "must?"]

It follows from the reasoning of the Court of Common Pleas in *Brown v. Mallett* (1) and of the Court of Exchequer in *White v.*

and published in the London Gazette, Friday, 19th March, 1880, p. 2135, provides "that all vessels when employed to mark the positions of wrecks or other obstructions, shall exhibit two

bright lights placed horizontally not less than six nor more than twelve feet apart."

(1) 5 C. B. 599.

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Crisp (1) that the defendants are liable for leaving the wreck of the *Douglas* sunk in the Thames without giving any warning to approaching vessels. It is unnecessary to say that any one of the crew was guilty of negligence in not affixing a light after the vessel had sunk; but the mate might have done so. It was an act of negligence to leave the wreck of the *Douglas* without a light; the act of lighting the wreck was merely discretionary on the part of the Thames Conservancy: *Forbes v. Lee Conservancy Board* (2); *The Ettrick* (3), and the mate of the *Douglas* was not justified in assuming that the Thames Conservators would by the harbour-master perform it. The mate might have obtained a boat and himself might have affixed a light to the wreck.

Bucknill was not called upon to reply.

LORD COLERIDGE, C.J. It seems plain to me that the judgment of the Admiralty Division cannot be supported. Two courses are open to us: we can either send the case back for a new trial, or pronounce judgment upon the materials before us. As the evidence was not given, and it is not certain what it would turn out to be, we could only grant a new hearing if the rejection of the evidence tendered were the only matter which we had to determine; but upon the facts before us we can reverse the judgment of the Admiralty Division, and enter judgment for the defendants.

The only question upon the evidence before us is whether the defendants were guilty of negligence; of course I am not speaking of the original negligence conducing to the original collision. It appears from all the facts that there was no negligence of which the plaintiff can take advantage. There was a collision between the *Douglas*, the *Duke of Buckingham*, and the *Orion*, and afterwards between the *Douglas* and the *Mary Nixon*. After the *Douglas* had been sunk, a light was fixed in her rigging. The master of the *Douglas* having been thrown into the water was taken in a boat to near Gravesend. Then the tug called the *Endeavour* went to Gravesend: there the mate instructed the captain to go to the harbour-master and to request him to take care of the wreck. The defendants caused the captain of the

(1) 10 Ex. 312.

(2) 4 Ex. D. 116.

(3) 6 P. D. 127.

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Endeavour to be called as a witness. The counsel for the plaintiff objected that the conversation between the harbour-master and the captain of the *Endeavour* took place behind the back of the plaintiff, and therefore could not be received in evidence. The judge of the Admiralty Division excluded it. The objection has not been seriously supported to-day; for the evidence was tendered as relating to an act done and tending to disprove negligence, a competent person having been sent to inform the harbour-master. It was urged that the evidence was immaterial, because the master and the mate of the *Douglas* had no right to delegate their duty to take due and proper care of the wreck to the harbour-master; for it appears clear that the defendants still claimed to be owners of it. The evidence was not immaterial. I think that it was wrongly rejected. But it was stated to the mate of the *Douglas* that the harbour-master had undertaken to light the wreck; there was therefore evidence that the mate who represented the defendants thought that the harbour-master had undertaken to light the wreck. The harbour-master *may* exercise the powers of the Removal of Wrecks Act, 1877, and it is unnecessary to give any opinion as to the construction of the Act, and to determine whether he *must*; for having the power he appears to have undertaken to do the duty. It is to go too far to say that the captain and the mate of the *Douglas* were guilty of negligence; for even upon the present facts it must be inferred that the mate asked the official to do that which he had the power by statute to perform. It has been argued that an action is maintainable, because it does not appear that the harbour-master performed the duty; but it must be inferred upon these facts that he undertook to do the duty, and at least the mate of the *Douglas* had fair ground for supposing that he would perform it. The master and the mate of the *Douglas* had no power to retain the *Endeavour* to light the wreck. No act has been pointed out which they might be fairly expected to do. The evidence was improperly rejected, but sufficient evidence is before us to shew that all things reasonable were done; there is no ground for finding that the master and the mate of the *Douglas* were guilty of actionable negligence.

I think it unnecessary to discuss the two cases which have been

mentioned, *Brown v. Mallett* (1) and *White v. Crisp*. (2) I entertain a great respect for the learned judges who decided them; but I do not think that they trench upon our decision, for they assume that the possession and the control over the sunken ship must remain in the owners in order to render them liable; these cases may be good law, for in *Brown v. Mallett* (1) it was held that the owner of the barge was exempt from liability on the ground that the declaration did not shew him to be in possession at the time of the damage to the plaintiffs' steamship, and in *White v. Crisp* (2) the action was founded on the circumstance that the defendants had the possession and the control of the wreck.

Upon the grounds that I have stated, I am of opinion that the materials before us shew that the judgment of the Admiralty Division must be reversed.

BRETT, L.J. This is an action to recover damages for the injury occasioned to the plaintiff's steamship the *Mary Nixon* by the negligence of those in charge of the defendants' steamship, the *Douglas*. The facts may be shortly stated as follows: the *Douglas* whilst going up the Thames came into collision with another vessel, the *Duke of Buckingham*, and sank; the collision was due to the negligence of those on board the *Douglas*; a light was fixed in her rigging, but it was extinguished upon her sinking. The mate of the *Douglas* went up to Gravesend and requested the captain of the tug called the *Endeavour* to ask the harbour-master to fix some lights on the wreck; the harbour-master said that he would do this, and his answer was reported to the mate of the *Douglas*. Before any lights were fixed to the wreck, the plaintiff's steamship in passing up the river struck against the sunken wreck of the *Douglas* and sustained the injury in respect of which this action is brought. The liability of the defendants was alleged to exist upon three grounds. First, it was said by the plaintiff's counsel that a duty was imposed upon the defendants to light the wreck, that the duty was of the same nature as if the defendants had contracted with the plaintiff to light it, and that they are absolutely liable for the breach of it; this really seems to me to be almost the same as to argue that there was a contract:

(1) 5 C. B. 599.

(2) 10 Ex. 312.

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the contention is quite unsustainable, no duty at least of that description can exist. Secondly, it was assumed in the argument that the defendants had committed an indictable offence in the channel of a navigable river; that was the effect of the argument addressed to us, although this contention was not put forward in direct terms. To wilfully scuttle a ship in a tide-way so as to cause an obstruction may possibly be an indictable offence; but what the defendants did was no indictable offence. Their own ship sank. It seems to me clear that no greater liability can exist against the defendants than if their steamship had sunk without negligence. What is the liability of the owners of a sunken ship which is lying in a tide-way? if they keep possession of her, they must give notice where she has gone down. This is all their liability. Thirdly, it was said that the defendants did not take care to give notice where the wreck of the *Douglas* was lying. I incline to agree that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is *primâ facie* to act; it is for the plaintiff to prove that there was negligence. The captain appears to have gone ashore after the *Douglas* sank: what was he to do? he was not guilty of negligence. As to the mate, he gave instructions to the captain of the tug *Endeavour* to inform the harbour-master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the *Douglas* had a right to assume that the harbour-master would do what he promised. Upon the evidence before us there was no negligence and no liability upon the defendants. The judgment of the Admiralty Division cannot be supported. I say nothing as to *Brown v. Mallett* (1) and *White v. Crisp* (2) except that they were decided on demurrer.

COTTON, L.J. I think that the evidence was improperly rejected. Under the Removal of Wrecks Act, 1877, s. 4, the harbour-master had power to put up lights, and I think it became his duty to remove a dangerous obstruction. In my opinion the

(1) 5 C. B. 599.

(2) 10 Ex. 312.

evidence if it had been received would have shewn that the defendants had for the time abandoned the control of the wreck. There was therefore a wrongful rejection of evidence; but I agree that there ought not to be a new trial, for it is proved by the deposition of the mate of the *Douglas* that the collision was reported to the harbour-master, and that the mate did receive a communication from the harbour-master. This circumstance exonerates the defendants from the charge of negligence, for it gave the harbour-master notice to perform the duty. The plaintiff cannot say that the injury to his steamship, the *Mary Nixon*, was occasioned by the defendants' wrongful act; his loss did not happen through their negligence.

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Cotton, L.J.

Judgment reversed.

Solicitors for plaintiff: *Gellatly, Son, & Warton.*

Solicitors for defendants: *William A. Crump & Son.*

J. E. H.

[PRIVY COUNCIL.*]

July 4.

[ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.]

THOMAS HARRIS AND GEORGE LANGSFORD CLAY *v.* JOHN PERKINS
AND RICHARD WILLIAM ENRAGHT.

Public Worship Regulation Act, 1874—Substitution of succeeding Churchwarden as Promoter of a Suit.

There is no power given by the Public Worship Regulation Act, 1874, to substitute succeeding churchwardens for a churchwarden who has instituted a suit for acts committed during the time he was churchwarden.

Quære, as to the effect upon a suit, of the churchwarden who instituted it ceasing to be a churchwarden or a parishioner.

APPEAL from an order of Lord Penzance (see 7 P. D. 31) sitting as Official Principal of the Arches Court of Canterbury (Nov. 30, 1881), dismissing an application made to him by the appellants that their names, or the name of the appellant Clay alone, might be substituted in the suit of *Perkins v. Enraght* for the name of Perkins, or that the future conduct of the said suit might be given

* *Present*:—LORD BRAMWELL, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR HENRY S. KEATING, and SIR JOHN MELLOR. Assessors: THE BISHOP OF LONDON, THE BISHOP OF DURHAM, and THE BISHOP OF LIVERPOOL.

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to them or Clay alone, or that they might appear and intervene in the said suit on the ground that the respondent Perkins was not at the date of such application a churchwarden of Holy Trinity Church, Bordesley, to which the suit related. Perkins, as parishioners' churchwarden within the meaning of the Public Worship Regulation Act, 1874 had instituted the suit.

J. Theodore Dodd, for the appellants, contended that this representation under the Public Worship Regulation Act, 1874 (37 & 38 Vict.), c. 857, was a civil and not a criminal matter. In a civil suit the prosecutor must have a continuing interest to enable him to continue the proceedings. He referred to *Bluck v. Rackham* (1); *Reg. v. Bishop of Oxford* (2); *Liddell v. Beal* (3); *Lee v. Fagg*. (4)

[*Willis*, Q.C. In civil suits of which the Ecclesiastical Courts took cognizance under their ancient jurisdiction, there must be a continuing interest of some kind in the promoter. This, however, is not a civil suit, and even if it were, my admission does not apply to statutory suits. The question is as to Lord Penzance's power under the statute.]

See the Public Worship Regulation Act, 1874, preamble, sects. 4, 6, 8, 9; *Dale's Case*, *Enraght's Case* (5); *Daniell's Chancery Practice* (5th ed. p. 1389) as to suits by churchwardens; *Elphinstone v. Purchas* (6); *Rothery's Returns*, No. 90, p. 41; *Martin v. Mackonochie* (7); Rules 78, 79, 80, 81 in 4 P. D., p. 266. The cases shew that the general ecclesiastical law must be read in connection with the Act: *Green v. Lord Penzance* (8); *Marriott v. Tarpley*. (9) As to the power to substitute see *Emden v. Carte*. (10) If the suit be a criminal one, the appellants ought to be substituted: *Dean of Jersey v. Rector of —* (11). There is no case where an ex-churchwarden has been allowed to carry on a suit against the wish of the parishioners and the succeeding churchwardens.

Willis, Q.C., and *Jeune*, for the respondent Perkins, were not called upon.

(1) 5 Moore, P. C. 311.

(2) 4 Q. B. D. at p. 583.

(3) 14 Moore, P. C. 1.

(4) Law Rep. 6 P. C. 38, 44.

(5) 6 Q. B. D. 474.

(6) Law Rep. 3 P. C. 256.

(7) 6 P. D. 87.

(8) 6 App. Cas. at p. 679.

(9) 9 Sim. 279.

(10) 17 Ch. D. at p. 173.

(11) 3 Moore, P. C. 229.

The judgment of their Lordships was delivered by

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SIR BARNES PEACOCK. This is an appeal from a judgment of the Arches Court of Canterbury, delivered by the Right Honourable James Plaisted Baron Penzance, sitting as Official Principal of that Court, upon a motion made in a proceeding commenced by representation against the respondent, Richard William Enraght, who is incumbent or vicar of Holy Trinity, Bordesley, in the county of Warwick, within the diocese of Worcester. The representation was made to the Bishop of Worcester under the provisions of sect. 8 of the Public Worship Regulation Act of 1874, by John Perkins, who was then the parishioners' churchwarden of Holy Trinity; and it is thus summarised in the words of the appellant's case:—"It stated in effect that the said Richard William Enraght used certain unlawful ecclesiastical vestments in, and introduced certain unlawful ritual practices into, and made certain unlawful ceremonious gestures during divine service on several occasions in public worship at the parish church of Holy Trinity aforesaid; and, further, as the 9th head of the representation, that he caused to be sung the hymn, 'O Lamb of God that takest away the sins of the world,' during the administration of the Holy Communion at the church. The representation also stated as its 14th head that the said Richard William Enraght had, without lawful authority, unlawfully set up and retained a metal cross on the communion table in a particular manner. This representation was made to the Bishop of Worcester, who transmitted it to the Archbishop of Canterbury, and the said archbishop required Lord Penzance to hear it in accordance with the said Act. Lord Penzance accordingly heard it, and issued a monition to the said Richard William Enraght to give up the use of all or most of the vestments, practices, and gestures of which complaint was made in the representation, and not to cause the said hymn, 'O Lamb of God that takest away the sins of the world,' to be sung. Lord Penzance also ordered the removal of the said metal cross, but merely on the ground that it had been placed on the communion table without a faculty. The said Richard William Enraght did not then appear."

John Perkins was the parishioners' churchwarden at the time the practices complained of took place. He was, therefore, per-

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fectly competent to institute the proceedings. He was re-elected parishioners' churchwarden, and was a churchwarden at the time when the monition was issued; but subsequently to that time he ceased to be churchwarden. Mr. Clay was then appointed the parishioners' churchwarden, and Mr. Harris was appointed churchwarden by the incumbent. On the 16th of November, 1881, a motion was made before Lord Penzance in pursuance of notice served upon the respondents to the effect "that the said Thomas Harris and George Langsford Clay, or the said George Langsford Clay alone, might be substituted for the said John Perkins in the above suit or matter of representation; or that the future conduct thereof might be given to the said Thomas Harris and George Langsford Clay, or the said George Langsford Clay alone; or that the said Thomas Harris and George Langsford Clay might be permitted to intervene;" and for general relief. The motion was heard by Lord Penzance on the 16th of November, 1881. The said John Perkins appeared by counsel to oppose it. The said Richard William Enraght was served with notice of motion, and was called but did not appear. Lord Penzance refused to grant the motion, and said:—"I am of opinion that this Court has no power to do what it is asked to do in either of the forms in which the application has been made. What may be the effect of Mr. Perkins, the person who made the representation in this suit, having ceased to be churchwarden, and having ceased to reside in the parish,—what effect that may have on the existing suit,—is a matter that I do not inquire into to-day." It is also unnecessary for their Lordships on the present occasion to inquire into that matter. All that they have to deal with is this: whether, upon the construction of the Public Worship Regulation Act of 1874, sects. 8 and 9, the suit which was instituted abated in consequence of Mr. Perkins ceasing to be churchwarden and parishioner, and whether the new churchwardens, or either of them, had a right to be substituted or to take out of Mr. Perkins' hands the conduct of the proceedings in the suit, or to intervene in the suit.

That question depends upon the construction of 37 & 38 Vict. c. 85; and their Lordships think that it is not important to consider whether the proceeding was a civil or a criminal suit under the old law of the Ecclesiastical Courts. Sect. 4, which was

cited in the course of the argument says:—"Proceedings taken under this Act shall not be deemed to be such proceedings as are mentioned in the Act of the 3rd & 4th years of the reign of Her Majesty, chapter 86, section 23." That section is to this effect: that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the law ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than as hereinbefore enacted or provided. In other words, proceedings under the Public Worship Regulation Act, 1874, are not to be deemed to be a criminal suit within the meaning of the Church Discipline Act, and may be instituted in the manner directed by the Public Worship Regulation Act. Their Lordships are of opinion that the object of the Public Worship Regulation Act, 1874, was not so much to carry out the wishes of all or even a large majority of the parishioners, as to give an easy mode of compelling obedience to the law. By sect. 8 it was enacted:—"If the archdeacon of the archdeaconry or a churchwarden of the parish, or any three parishioners of the parish within which archdeaconry or parish any church or burial ground is situate, or for the use of any part of which any burial ground is legally provided, or in case of cathedral or collegiate churches any three inhabitants of the diocese, being male persons of full age, who have signed and transmitted to the bishop under their hands the declaration contained in Schedule A. under this Act, and who have, and for one year next before taking any proceedings under this Act have had, their usual place of abode in the diocese within which the cathedral or collegiate church is situated, shall be of opinion," that any of those Acts which are set out in the Act have been committed, "such archdeacon, churchwarden, parishioners, or such inhabitants of the diocese, may, if he or they think fit, represent the same to the bishop" by sending the bishop a representation in the form contained in the schedule.

There are three classes of persons who are authorized to send a representation; the archdeacon; a single churchwarden, not the churchwardens as a corporation but a single churchwarden; or three parishioners, and if they have been inhabitants of the parish during the time these practices have been going on, they, or either

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of them, have a right to make a representation to the bishop. In this case the representation was made by the parishioners' churchwarden, and he had a right at the time when he instituted the proceedings to take those proceedings. If three parishioners had thought fit they might have done so, or the archdeacon, if in an archdeaconry, might have done so; but neither of these parties were bound to do it unless they pleased.

Sect. 9 gives power to the bishop to refuse to entertain the representation if he thinks it is one which ought not to have been made. "Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion, and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the person or some one of the persons who shall have made the representation, and to the person complained of), he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of and shall require such person, and also the person making the representation, to state in writing, within twenty-one days, whether they are willing to submit to the directions of the bishop touching the matter of the said representation, without appeal; and if they shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper; and no appeal shall lie from such judgment or monition." Then if the person making the representation and the person complained of shall not agree to submit to be bound by the decision of the bishop, the representation is to be sent to the archbishop, who shall order the Judge to proceed to hear the matter. Then, "The Judge, before proceeding to give the notice required by the Act, shall require from the person making the representation such security for costs as the Judge may think proper, such security to be given in the manner prescribed by the rules and orders." It is said that in the present case no such security for costs was given, but at any rate their Lordships may consider the case as if such security had been given.

The cases which have been cited with regard to a suit abating by death are not applicable to the present case. There is nothing in the Act to the effect that if a churchwarden who makes the representation ceases to be a churchwarden, or if he ceases to be a parishioner, he shall not go on with the suit; and it would be most inconvenient if the case were otherwise. Suppose proceedings are instituted by the parishioners' churchwarden, and he ceases to be the churchwarden, can the incumbent's churchwarden come in and ask to be substituted? Or suppose the succeeding churchwardens do not think that what the clergyman did was unlawful, or are persons who would not, if they had been churchwardens, have made the representation; are they to be substituted, and to be at liberty to refuse to carry on the proceedings? If so, for the year during which they remain churchwardens, the suit might be allowed to cease or drop, and in the succeeding year the next churchwardens would have a right to come in and say, Let us be substituted; your term of office has ceased, and we wish to carry on the proceedings. It would be most inconvenient if proceedings instituted at the pleasure of any of the persons authorized by the Act to make a representation to the bishop should abate by reason of their ceasing to hold office, or to be parishioners, during the period covered by the suit.

Under these circumstances, their Lordships, agreeing with Lord Penzance that it is unnecessary to say what the effect of Mr. Perkins ceasing to be churchwarden or ceasing to be a parishioner may have upon the suit, are of opinion that no power is given by the Act to substitute succeeding churchwardens for a churchwarden who has instituted a suit for acts committed during the time he was churchwarden; and that the succeeding churchwardens, in the present case, had no interest in the matter which entitled them to intervene in the suit.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of Lord Penzance be affirmed, and that the appellants do pay the costs of this appeal.

Solicitors for appellants: *Robinson, Preston, & Stow.*

Solicitors for respondent John Perkins: *Tebbs & Son.*

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H. C. J.

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April 18.

[IN THE COURT OF APPEAL.]

GANDY v. GANDY.

Separation Deed—Covenant not to sue for greater Allowance—Subsequent Adultery—Permanent Alimony.

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A husband having committed adultery, disputes arose between him and his wife which led to his committing acts of legal cruelty. A separation deed was then executed, by which he agreed to allow her 250*l.* a year, and to maintain the two youngest children, who were not to be in her custody; and she covenanted not to take any proceedings to compel the husband to allow her a larger amount of alimony. Subsequently the husband committed adultery, and the wife obtained a decree for judicial separation and an order that she should have the custody of the two youngest children. The husband had since the date of the separation deed become wealthy, and the wife applied for an inquiry as to his means with a view to obtaining increased alimony :—

Held, reversing the decision of the President, that increased alimony could not be ordered, for that as the Court had not, as it would have had in the case of a decree for dissolution, power to alter the separation deed, the covenant by the wife not to sue for increased alimony was binding on her, and must have effect given to it, the husband not having, in the opinion of the Court, been guilty of such misconduct as under the circumstances of the case would disentitle him to claim the benefit of the deed.

THIS was an appeal by Maurice Gandy, the husband, from a decision of the President of the Divorce Court. (1) The facts appear from the judgments of the President and of the Master of the Rolls.

Robinson, Q.C., and *Middleton*, for the appellant. The separation deed bars all right to increased alimony. The decision below was that a separation deed is binding only so long as the party claiming the benefit of it lives in chastity. But it has been repeatedly decided that in the absence of express stipulation, unchastity does not affect the operation of a separation deed. *Evans v. Carrington* (2) proceeds on that principle, and the cases at law are clear : *Jee v. Thurlow*. (3)

[JESSEL, M.R. You need hardly cite cases to shew that it is so at law. The question is, whether a Court of Equity would have restrained proceedings for further alimony?]

(1) Ante, 77.

(2) 2 D. F. & J. 481.

(3) 2 B. & C. 547.

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In *Williams v. Bailly* (1) there was no sufficient proof of an unqualified acceptance by the wife of the provisions of the separation deed, and an injunction was refused; but the observations of the Vice-Chancellor shew that he thought the wife might have been bound by the provisions of such a deed, so as to be precluded from suing for further alimony, if she had acceded to it. The judgment of the President went much on *Morrall v. Morrall* (2) and other cases decided by himself, in which alimony beyond what was given by a separation deed was granted; but they were cases where a dissolution of marriage had been pronounced, so that the powers given by 22 & 23 Vict. c. 61, s. 5 and 41 Vict. c. 19, s. 3, as to altering settlements, gave the Court greater power. *Besant v. Wood* (3) shews that the Court will enforce a stipulation in a separation deed not to sue in the Divorce Court. The statute 20 & 21 Vict. c. 85, s. 17, enables the Court to make such order as to alimony as shall be just, but assuming that the covenant does not absolutely bar the wife from suing, still what allowance is just cannot be determined without regard to a contract between the parties.

Inderwick, Q.C., and *Tatham*, contra. The statute enables the Court in any case of judicial separation to make any order as to alimony which shall be deemed just.

[JESSEL, M.R. That means which shall be just; and if a wife has bound herself to accept a certain amount is it just to give her more?]

The husband substantially is suing for specific performance of the separation deed, and the question is whether his conduct has not been such as to entitle the wife to say that he cannot enforce it.

[JESSEL, M.R. The President seems hardly to have considered this point, that he was not in a position to give what alimony he thought just, for if he thought that alimony to a less amount than what was given by the separation deed was proper he could not take away what the deed gave.

LINDLEY, L.J. Was there any object in the suit except alimony?]

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(1) Law Rep. 2 Eq. 731.

(2) 6 P. D. 98.

(3) 12 Ch. D. 605.

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Yes; the custody of the two younger children, from which she was excluded by the deed, but which she gained in the suit. The husband's conduct has been such as to disentitle him to the benefit of the deed. The judge considered that a woman might agree to take less than the Court would give her in order to settle the matter out of Court and to avoid publicity, but that she ought not to be bound by it if there was serious misconduct afterwards on the part of the husband such as to justify her taking proceedings for a separation.

Middleton, in reply.

[LINDLEY, L.J. Is there any case in which a husband, who after a separation deed has grossly misconducted himself, has obtained an injunction?]

Evans v. Carrington (1) is the only case in equity which touches on the point. Somewhat similar questions were raised on equitable plea in *Goslin v. Clark* (2) and *Kendall v. Webster*. (3)

JESSEL, M.R. This case raises a point which is at once novel and important. There was a separation deed between the husband and wife after the husband had committed adultery to the knowledge of the wife, and had thereby caused quarrels which led to acts of legal cruelty by the husband towards the wife, and ultimately caused the separation. By the separation deed the husband, not then having made so large a fortune as he afterwards made, agreed, after provisions for the maintenance of the children, to allow the wife 250*l.* a year, and she agreed that she should not, nor should any person in her behalf at any time thereafter, commence or prosecute any suit or other proceeding for compelling the husband to allow her any support, maintenance, or alimony, except as aforesaid, or to cohabit or live with her. At a subsequent period the husband renewed his intercourse with a woman with whom he had previously committed the adultery which led to the separation, and the wife instituted a suit in the Divorce Court for judicial separation, and obtained a decree. She was entitled to institute this suit because, as she said, she was deprived by the deed of the custody of her two younger daughters who

(1) 2 D. F. & J. 481.

(3) 1 H. & C. 440.

(2) 12 C. B. (N.S.) 681.

were to be maintained by the husband and kept at school, and she claimed the right to their custody, and succeeded in obtaining it. Probably considering that the two younger children were girls, and that the mother was free from blame, it would have been impossible to interfere so as to prevent her from commencing and continuing her suit to a successful conclusion, having regard to her rights as regards those children, and having regard to the benefit of the children themselves. But the husband remained liable under the deed, and is still liable to the maintenance of those younger children.

It is however very clear to my mind that there was another motive for the institution of these proceedings. The husband, it appears, had made an invention which turned out very successful, and it was stated on one side, and was not denied on the other, that he had thereby made a very considerable fortune. It appears to me obvious that this accession of fortune was also an inducement to the institution of this suit. After arrangements had been made in the suit as to the custody and maintenance of the children, an application was made for further alimony on the part of the wife, which application was granted in substance, though not in form, by the order appealed from. I say in substance, because the case was not argued merely on the question as to whether the Court should be put in possession of the facts as regards the husband's fortune before coming to a conclusion, but on the assumption that (as was well known to all parties to be the fact) the husband's fortune had now become very considerably larger than it was before, and that if the wife succeeded in the application to have an inquiry directed as to the means of the husband she would succeed in the application for an increase of alimony. The learned judge of the Court below decided that by reason of the subsequent adultery of the husband under the circumstances I mentioned, the wife was entitled to apply for and obtain a larger sum in the shape of alimony than the 250*l.* allotted to her by the deed. The question is whether that was right.

The first point to be considered is that the contract made by the husband in the deed of separation cannot be affected by the subsequent adultery of the husband. He is liable under his covenant whether he commits adultery or not, and in fact he

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would be liable under the covenants, even if the wife had committed adultery. That is settled law. The legislature has not thought fit in the case of judicial separation to give the same powers to the Court that it has given in the case of dissolution of marriage. In the case of dissolution of marriage the Court has had conferred upon it the right to vary not only post-nuptial but ante-nuptial settlements, and to deal with them in any way which may be thought just and expedient. But in the case of judicial separation, there being no such power, the deed remains binding. The wife is entitled to the annuity secured her by the deed, the husband is liable to pay the annuity. It is impossible, therefore, for the Court to allot such alimony as it may think just, because in the case of its thinking that the amount of alimony should be less than the annuity secured by the deed, it has no power of setting aside the deed and no power to stop an action brought under the covenants of the deed by the trustees against the husband. It is, therefore, a case where the ordinary powers of the Court cannot be exercised, except in one direction, viz., by increasing the amount of alimony. That being so, we must consider whether in such a case of contract the Court can interfere except when one of the parties to the contract has so acted as to disentitle him to rely upon the contract at all. I am not saying that there may not be such a case; on the contrary, I can quite conceive such a case. But, unless there is such a case, why should the Court interfere with the contract? I see that the learned judge put it on the ground of public policy. I have explained more than once, and especially in a case which has been referred to by the learned judge himself of *Besant v. Wood* (1), that there is no reason more dangerous to give, and no reason on which such difference of opinion exists, as public policy. He has said, "If you do not allow the wife to ask for increased alimony in such a case as this you allow the husband to commit adultery with impunity." I am by no means prepared to say that this remark is correct. It is not impunity merely because he is not obliged to pay more money. I do not consider that payment of alimony is the only punishment for adultery if the word "punishment" should be used in connection with it. No doubt he may be to some extent

(1) 12 Ch. D. 605.

relieved from that liability, but the contract is one by which he is compelled to pay an amount having regard to his then state of fortune which might have been much larger than at the date the decree for separation, for his fortune might have diminished instead of increasing. It appears to me a very strong thing to say that by his committing an act which does not affect the wife either directly or indirectly her rights to participate in his fortune should be altered.

Now, in the present case, how is the position of the wife affected by the husband's subsequent conduct? She was separated *de facto* and *de jure* before the institution of the suit. Her maintenance was the same whether her husband did or did not live with another woman. Her rights in every respect remained unaltered. It may be said, no doubt, in one sense, that her position was affected by his conduct, which made it less probable that he would return to cohabitation. But people who execute deeds of separation under such circumstances, are not presumed to suppose or to assume that the return to cohabitation is very probable. It does not appear to me, looking at what occurred before the separation, and considering what the husband has done since, that you can say he is in such a position as to have forfeited all his rights under the deed, leaving him subject to all his liabilities under it.

It seems to me that, having regard to the relative positions of the husband and wife, there has not been misconduct on the part of the husband so affecting the position of the wife as to entitle her to repudiate the contract she entered into, therefore the contract is still binding and the appeal must be allowed.

COTTON, L.J. In this case there has been an application by the wife, under which she has obtained a reference to ascertain what is the income of her husband, for the purpose avowedly of obtaining maintenance to a larger amount than is given by the deed of separation. This is clearly contrary to one of the covenants contained in that deed, and the question we have to consider may be put in two ways, whether that covenant can, under the circumstances, be disregarded, or, as was put by the judge in the Court below, whether a Court of Equity would, under

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the circumstances, have enforced this covenant against the wife. I do not intend to give any opinion on the latter view of the question, because, in my opinion, it is not necessary to decide it, though I am far from saying that a Court of Equity would not in former days have interfered by injunction to restrain such an application as that now made by the wife. But the learned judge seems to have decided the matter on principles that would lead to the conclusion that the deed was bad altogether at law (which it is not), because he said this deed must be read as containing an implied condition that it shall be operative so long as the parties shall live chastely, and that to hold that the present appellant was right would be to say that this deed contemplated and allowed adultery on the part of the husband. I cannot agree with such a conclusion. The question is whether the misconduct of the husband is such misconduct towards the wife as, having regard to the circumstances known to her at the time the deed was entered into, entitled her to say this covenant is not to be regarded upon the application for alimony. In my opinion, unless the conduct of the husband has been such since the deed as entirely to prevent him from relying on the deed at all, then even if he could not under the old practice have obtained an injunction to restrain the proceedings of the wife, still the deed must be taken into account in considering what allowance it is just to make. It is very true that the deed did not contemplate or provide for future adultery, but the conduct of the appellant towards the wife is of the same character and nature as that of which she was aware when she entered into the deed. It is not suggested that there was any representation made to her which induced her to take this 250*l.* as an allowance. It is said that she has to maintain two children whom she had not with her before. But that is not so. The husband still remains liable under his covenant to provide for the two younger children, and they are still left at the school pointed out by him. All the difference is that she is to have them during the holidays, leaving her husband still liable for their maintenance. In my opinion, the conduct of the husband since the deed is not such, as, having regard to what was known to the wife at the time she entered into the deed, can disentitle him from relying on the deed. I put it that way, because I quite

agree with the Master of the Rolls, that we ought not to say, and I do not entertain the opinion, that there can be no misconduct on the part of a husband such as would disentitle him to set up a deed of separation of this kind when the wife is making an application for an increased allowance. The case of *Morrall v. Morrall* (1), one of the cases referred to by the learned judge, as leading to the conclusion at which he arrived, is an instance. There, there was a deed of separation with a provision as to what maintenance the wife was to have. She subsequently ascertained that the husband was living in incestuous adultery. It may well be that such gross misconduct, misconduct of a nature so entirely different from that which the parties were providing for when they entered into the deed of separation, might prevent the husband from in any way relying on that deed, and might render it just that the bargain made by the wife for maintenance should be disregarded on an application to the Court for alimony. Here, in my opinion, the circumstances are not such as to entitle the wife to disregard her bargain.

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LINDLEY, L.J. The question we have to consider may be put in this shape, whether there has been any sufficient reason given for holding the wife discharged from her covenant not to sue for further alimony. *Primâ facie*, she is bound by that covenant in all the Courts, whatever difficulty there may be about specific performance or injunction. It is a perfectly good covenant. The order appealed from is an order which does not give effect to that covenant, but sets it aside, and the question is whether, under the circumstances, that is right? The power of dealing with this question of alimony is given or governed by 20 & 21 Vict. c. 85, s. 17. This being only a suit for judicial separation, the power of the Divorce Court over these deeds is much less than it would be after a decree for dissolution of marriage. It is a much more restricted jurisdiction and power, and it appears to me that the cases, of which *Morrall v. Morrall* (1) is one, where the Divorce Court has dealt with separation deeds after decrees for dissolution of marriage, are rather misleading, when they are applied, or sought to be applied, in a case where the Court has no

(1) 6 P. D. 98.

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such extensive jurisdiction. Now, the language of s. 17, as regards alimony, is this: "Where the application is by the wife the Court may make any order for alimony which shall be deemed just." That must be taken to mean "just under the circumstances of the particular case," and one of the most important circumstances in any case is the bargain, if any, which has been made between the parties. If the parties have agreed that a certain sum shall be sufficient, *primâ facie* that is just, and *primâ facie* the Court cannot either increase or diminish it. Indeed, I doubt very much whether under the powers of this section, the Court could under any circumstances, say that less than 250*l.*, was just. I do not think the section goes that length. If that be so, the analogy between the statutory power of dealing with alimony under s. 17, and the statutory powers of dealing with separation deeds, after a decree for dissolution, fails altogether. If that section is to be read in the way in which it appears to have been read by the president of the Court below, the power is limited in one direction but not in the other, which I cannot think correct.

It strikes me, on the whole, the case is reduced simply to this: There has been on the part of the husband no misconduct towards the wife except adultery with another woman, and now that we understand the position of the children, there was no reason that I can see for the wife's seeking judicial separation, except as a means of getting further alimony. Under those circumstances—is the mere fact of the adultery sufficient to deprive the husband of the benefit of the stipulation as to alimony? I do not think that it is, and therefore I agree with the other members of the Court, that the order appealed from must be discharged.

Appeal allowed.

Solicitors for appellant: *Gregory, Rowcliffes, & Co.*

Solicitors for respondent: *W. & A. Ranken Ford.*

H. C. J.

[IN THE COURT OF APPEAL.]

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March 15.

WIGNEY v. WIGNEY.

*Dissolution of Marriage—Variation of Settlements—22 & 23 Vict. c. 61, s. 5—
41 Vict. c. 19, s. 3.*

The fortune of a wife was settled as to a part producing 950*l.* a year on the husband for life, then on the wife for life; as to the residue producing 1200*l.* a year on the wife for life, then on the husband for life; and after the decease of the survivor, in default of children of the marriage, then as to the whole property on such trusts as the wife should by will appoint, and in default of appointment to the husband absolutely. There was no child of the marriage. The wife obtained a decree for dissolution of the marriage on the ground of adultery and cruelty. The husband had mortgaged his life interest for debts incurred in keeping up the joint establishment, and alleged that he had incurred other debts for the same purpose. The President of the Divorce Court, upon the wife's petition, made an order that the trustees of the settlement should stand possessed of all the funds upon the trusts which would be applicable thereto if the husband were dead, and had died in the lifetime of the wife, and free from the ultimate trust in default of appointment, but subject to the wife undertaking to pay the charges made by the husband on the trust funds:—

Held, on appeal, that the order must be affirmed, with this variation, that an account should be taken of all debts due from the husband incurred for the purpose of the joint establishment, and that the wife must undertake to pay them.

Though the power given to the Court of varying settlements is not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them respectively.

The judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property, and the Court of Appeal will not interfere with that discretion, unless there has been a clear miscarriage in its exercise.

By a settlement, dated the 16th of September, 1863, made on the marriage of Captain and Mrs. Wigney, the wife's fortune was settled as follows: As to such part of it as was mentioned in the first schedule upon trust to pay the income to the husband for life, and after his death to the wife for life. As to such part as was mentioned in the second schedule upon trust to pay the income to the wife for life for her separate use, and after her death to the husband for life. After the death of the survivor, all the property was to go to the children of the marriage, and if

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none, then to such persons as the wife should by will appoint, and in default of appointment to the husband. There was a covenant to settle after acquired property of the wife upon the same trusts as the property in the second schedule.

At the time of the marriage the property in the first schedule was worth about 15,000*l.*, and that in the second schedule about 6500*l.*, but this latter amount was afterwards increased to about 25,000*l.*, by the addition of after acquired property of the wife. The husband brought nothing into settlement.

On the 2nd of July, 1880, the wife obtained a decree for dissolution of the marriage on the ground of adultery and cruelty, which decree was made absolute on the 11th of January, 1881. There was no issue of the marriage.

The wife after the decree had been made absolute, presented her petition asking that the interest, rights, and powers of the respondent under the settlement might be extinguished, and that the property might be held upon the same trusts as if the respondent had died in the petitioner's lifetime, freed and discharged from the ultimate trust in his favour in the event of the petitioner making no appointment by will.

The husband alleged in defence that at the time of this marriage he was a captain in the army holding a staff appointment, and had a professional income of 1800*l.* a year, that at his wife's request he gave up his appointment and retired from the service, and had now no means but his half-pay of 7*s.* a day.

He further alleged that he and his wife had lived beyond their income, and that to pay the expenses of their joint establishment he had borrowed on mortgage of his life interest with policies of insurance sums amounting to 4200*l.*, the interest amounting to 210*l.* per annum, and the premiums to 118*l.* 18*s.* 9*d.* He further alleged that he owed about 2000*l.* for debts incurred during the co-habitation in keeping up the common household. This, however, was disputed by the petitioner, and it had not been ascertained how the case really stood. He had also mortgaged his life interest to his solicitors for the costs of the divorce suit.

At the time of the dissolution the income payable to the respondent under the settlement was 948*l.* 7*s.* 2*d.*, that payable to the petitioner was 1165*l.* 2*s.* 5*d.*

The matter was referred to the registrar for investigation, and he made a report submitting that it was proper to make an order that the trustees of the settlement should stand possessed of the funds upon the trusts which would be applicable thereto if the respondent were dead, and had died in the lifetime of the petitioner, and free from the ultimate trust in favour of the respondent in default of appointment by the petitioner by her last will.

On the 7th of February, 1882, an order was drawn up, directing that the report should be confirmed subject to the following directions, and that it should be referred back to the registrar to draw up and settle an order of the Court to carry the same into effect, and that the same should contain a provision that the petitioner should undertake the payment of all charges by the respondent on the trust funds, all questions as to the charge created by him in favour of his solicitors being reserved, and that upon payment by the petitioner of all the charges, the policies of assurance on the life of the respondent should be handed over to the respondent as soon as he had paid all costs of the suit for which he was liable to the petitioner, and it was ordered that in the meantime the policies should stand charged with the above costs, and that if the respondent should not pay those costs within three calendar months from the time when the charges were paid off, the petitioner should be at liberty to sell the policies, and should pay the balance to the respondent after deducting the costs.

The husband appealed from this order.

Searle and *Farwell*, for the appellant. The object of the enactments 22 & 23 Vict. c. 61, s. 5, and 41 Vict. c. 19, s. 3, is not to punish the guilty party, but to prevent the innocent party from suffering pecuniary loss by the dissolution: *Maudslay v. Maudslay*. (1) It was said in *Fitzgerald v. Chapman* (2), that the Chancery Division is not a Court of criminal jurisdiction, neither is the Probate Division. The husband's income ought to be left to him, subject to the liabilities which he has incurred. The enactments do not contain a word about the relative guilt of

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(1) 2 P. D. 256.

(2) 1 Ch. D. 563.

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the parties, and when the legislature intended conduct to be inquired into it said so, as is done in various clauses of 20 & 21 Vict. c. 85. The clauses were not intended for the purpose of punishment. The confining the earlier clause to a case where there were children shews the view of the legislature. The clause would enable the Court to make provision for a guilty wife. The object was to enable the Court to put the parties in the same pecuniary position as if there had been no dissolution: *Benyon v. Benyon* (1), and this order places the wife in a better.

Inderwick, Q.C., and *Middleton*, contra. In *Boynnton v. Boynnton* (2), the husband, who was the guilty party, was deprived of his life interest in the wife's property, and this has been followed ever since. In *Maudslay v. Maudslay* (3), the husband was deprived of all interest in his wife's property, and his own property was to some extent interfered with for the wife's benefit. In *Gladstone v. Gladstone* (4), the whole income of the wife's fortune was given to her.

[LINDLEY, L.J. The income there was a small one.]

The merits of the case are that the husband eighteen months before the decree eloped with a young woman whom it is believed that he intends to marry, and he strongly contested the case of cruelty in order that only a decree of judicial separation might be made, and his rights under the settlement not be interfered with. The remarks in *Cooke v. Cooke* (5) are strongly in favour of the respondent's contention.

Searle, in reply.

JESSEL, M.R. This case raises an important point, viz., what is the power of the Court, under s. 5 of 22 & 23 Vict. c. 61, as amended, not in the most artistic way, by the subsequent enactment 41 Vict. c. 19, s. 3. The first enactment enables the Court to apply all or any part of the settled property "either for the benefit of the children of the marriage or of their respective parents," and the second provides that the powers of the former may be exercised, notwithstanding that there are no children of

(1) 1 P. D. 447.

(2) 2 Sw. & Tr. 275.

(3) 2 P. D. 256.

(4) 1 P. D. 442.

(5) 2 Phillim. 40.

the marriage. This is in terms enabling the Court to provide for parents who have no child, but of course it means that the Court shall have the same power of applying the property for the benefit of the divorced parties or either of them, though there is no child, as it would under the former enactment have had if there were children. The first enactment runs thus: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a part of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." There are two possible constructions of this enactment, one is to read it as saying that the Court may make such orders as it shall think fit with reference to the application of the property for the benefit of the parties, which leaves the matter in the absolute judicial discretion of the Court. The other is to read it as authorizing the Court to make a reasonable provision for the parties with a view to their benefit. My opinion is that the literal construction of the section is the right one, and that the Court has full discretion as to what order it will make for the benefit of the parties or either of them. It was pressed on us that guilt ought to make no difference, but in my judgment the conduct of the parties is a material circumstance, and it is the duty of the Court to consider whose fault it is that the marriage has come to an end, not with a view of punishing the guilty party, but for the purpose of seeing what provisions it is reasonable to make. It was the course of the House of Lords in marriage annulling bills to allow maintenance to a guilty wife, and it would be reasonable for the Court in the same case to exercise its discretion in the same way, but it would not be right to make the same provision for her if guilty as would be made if she were innocent. In the case of a husband similar considerations must be entertained. Suppose a guilty husband is incapacitated by physical infirmity from earning a livelihood, and has no means of his own, I do not say that no provision can in any case be made for him out of the wife's property. That being so, this is a case of judicial discretion, and according to the

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rules which govern the Court of Appeal on appeals from the discretion of the judge below, in order to obtain a reversal, a case of miscarriage must be shewn. It is not sufficient for the appellant to convince the judges of the Court of Appeal that the order is one which they would not in the first instance have made, but he must shew that the judge has gone wrong in his law or made a mistake of fact, or ordered something so utterly unreasonable that the Court of Appeal is obliged to say there has not been a reasonable exercise of his discretion.

In the present case an officer in the army married a lady twelve years his senior. He had no fortune, but held a staff appointment. The lady had a fortune of about 2000*l.* a year. This fortune was settled so as to give the husband and wife successive life estates, the husband having the first life estate in a part now producing about 950*l.* a year, and the wife the first life estate in the remainder producing 1165*l.* a year. After the death of the survivor of the husband and wife, in default of issue of the marriage, the whole property was to go as the wife should by will appoint, and in default of appointment, to the husband. After eighteen years the marriage was dissolved on the ground of the adultery and cruelty of the husband. At the time of the dissolution he had his half-pay of 7*s.* a day, or about 128*l.* a year—he was a man in middle life able to do something to add to his income. Under these circumstances I do not see that it was obligatory on the Court to make further provision for him. What the Court did was to treat the incumbrances effected by him on his life interest as valid incumbrances, and subject to those incumbrances which absorbed between 300*l.* and 400*l.* of the income, the life interest was taken away from him. Was that unreasonable? Suppose the second view of the enactment to be taken, then as the wife gives up between 300*l.* and 400*l.* a year out of the income of her fortune, can I say that it was unreasonable to give her all the rest? The marriage having come to an end by the husband's fault, can he complain that the consideration having ceased the right of property should cease also? I cannot say that the judge exercised his discretion unreasonably.

There is, however, another point to be considered. The husband alleges that when he left his wife he had incurred debts for the

purposes of the joint establishment. As he was in receipt of about 900*l.* a year from the settled funds he might expect to be able to pay out of that, and moreover he would naturally look to his wife's income of 1100*l.* I think, therefore, that there would be nothing unreasonable in his incurring debts on account of the joint establishment to an amount not exceeding 2000*l.* Is it right that the tradesmen to whom these debts are owing should remain unpaid because the husband has behaved ill to his wife? I think not. Is it right as regards the husband that he should be left to pay these debts out of his own means? He may say, "I incurred these debts for the joint purposes of myself and my wife while I was giving the marriage consideration, and on the faith of the income of her property. Ought I not to have them paid out of it?" I think that he is entitled to have them so paid. Some expenses also are stated to have been incurred for the same purposes since the husband left the wife, and they come within the same principle. There must be an inquiry what debts there were owing by the husband for the purposes of the joint establishment at the time of the desertion, and what debts have since been incurred for the purposes of the joint establishment, and the wife undertaking to pay what shall be found due on the result of this inquiry, the order appealed from will in all other respects be affirmed.

COTTON, L.J. I am of the same opinion. The enactment 22 & 23 Vict. c. 61, s. 5, as amended by 41 Vict. c. 19, s. 3, does not give the Court power to declare a forfeiture, but to apply the property for the benefit of the husband and wife and their children, if any. This is a power which may be exercised so as to make due provision for either party. But in making that provision the Court ought to have regard to all the circumstances of the case, and cannot leave out of view the conduct of the parties. Can it be said here that the judge has exercised his discretion wrongly? If the case had come before me originally, I should not have made exactly the order which he has made, but that is not the question—the question is whether the judge has gone so wrong that it is the duty of the Court of Appeal to interfere. I cannot say that it is wrong to give the wife the whole income of

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her own property, subject to the incumbrances created by the husband on his life interest in part of that property, for she will not get so much as she had originally, but the allowances must be made which the Master of the Rolls has mentioned.

As regards the cases, I do not think that they lay down any rule adverse to my judgment. In *Boynton v. Boynton* (1) it could not be said that the whole income of the wife's property was too much to give her. In *Gladstone v. Gladstone* (2) the income was only about 300*l.*, and it could not be said that the whole of that was too much. If *Boynton v. Boynton* (1) had decided that whenever the husband is the guilty party the wife must have the whole income of her own property, I should have held myself bound by the decision, though I should not agree with it, but I do not think that it did decide that point.

LINDLEY, L.J. I also agree that the judgment should be affirmed, except as modified by the inquiry mentioned by the Master of the Rolls. The question is whether the judge has gone too far in striking out of the settlement the trusts in favour of the husband. Taking the two enactments together, I think that they give the judge a discretion how the settled property shall be applied for the benefit of the parties or their children. So long as he confines himself to that purpose he has a discretion, and we cannot, except in a strong case such as has been mentioned by the Master of the Rolls, review his decision, and if I were called upon to give an opinion, I should say that he has, in the present case, exercised his discretion reasonably. Suppose the appellant were to marry the woman with whom he has eloped, it would be shocking that any part of the wife's income should go to maintain him and the woman who is at the bottom of the mischief. I think that the provision as to the mortgages, and the inquiry which we now direct, give the husband all the provision that ought to be made for him.

Solicitors for appellant: *Stokes, Saunders, & Stokes.*

Solicitors for respondent: *Ayrton & Briscoe.*

(1) 2 Sw. & Tr. 275.

(2) 1 P. D. 442.

H. C. J.

THE MIRANDA. (1881. C. No. 6699; 1881. L. No. 3690.)

1881

Practice—Damage—Refusal to amend Preliminary Act.

Feb. 7.

The Court will refuse to allow a mistake in a preliminary act to be amended, even though the application for an amendment be made before the hearing of the suit and be supported by affidavit.

THIS was a motion to amend the plaintiffs' preliminary act in an action of damage brought by the owners of the steamship *Cleanthes* against the steamship *Miranda*. In support of the motion an affidavit was brought in, in which a member of the firm of solicitors having the conduct of the action on behalf of the plaintiffs, stated that he believed that certain clerical mistakes and omissions had been made in the fair copy of the plaintiffs' preliminary act filed in the registry; that the discovery of the probable existence of the errors and omissions in question had been made by him before the defendants' preliminary act had been opened, and when he was not aware of anything contained in it; and that the application for amendment was made *bonâ fide*, and not for the purpose of directly or indirectly prejudicing the case of the other side, or in consequence of anything which had come to the knowledge of the plaintiffs since the preliminary act sought to be amended had been filed. At the time this affidavit was made no pleadings had been delivered in the action.

W. G. F. Phillimore, for the plaintiffs, in support of the motion. The Court has the power to order a preliminary act to be amended, and should, in its discretion, allow an amendment, where as in the present case the object of the amendment is to correct a clerical error, and the application to amend is made before the hearing and is supported by affidavit: *The Vortigern*. (1) The 12th article of the draft copy of the plaintiffs' preliminary act contains words to the effect that when the collision was seen to be imminent "the engines of the *Cleanthes* were put full speed about between two and three minutes before the collision," and the principal amendment now asked for is that in this article

(1) Sw. 518.

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the words "full speed" should be struck out of the copy brought into the registry, and the words "full speed astern" be inserted in their place.

Myburgh, Q.C., for the defendants, was not called upon.

SIR ROBERT PHILLIMORE. I shall adhere to the practice I have always followed with regard to applications for leave to amend preliminary acts, and refuse to allow any such amendments to be made. The parties in an action of damage are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary acts, and it is open to them in their statement of claim, or statement of defence, to state correctly any facts which may have been omitted or erroneously stated in their preliminary acts, but I am quite sure that it would be improper for the Court to allow any alterations to be made in the preliminary acts. I therefore cannot accede to the application in this case, and I must reject the motion with costs.

Solicitors for plaintiffs: *Botterell & Roche*.

Solicitors for defendants: *Cooper & Co*.

G. B.

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March 7.

THE BREADALBANE. (Q. No. 557, Fo. 423.)

Damage—Regulations for Preventing Collisions at Sea, Art. 11.

A ship does not, by carrying a fixed white binnacle light in such a position as to be reflected astern, comply with the provisions of the eleventh article of the Regulations for Preventing Collisions at Sea, which provides that a ship which is being overtaken by another shall show from her stern to such last mentioned ship a white light or a flare-up light.

THIS was an action of damage instituted on behalf of the owners of the foreign brig *Conrad* and the owners of her cargo, against the ship *Breadalbane*, to recover for the damage arising out of a collision between the two vessels in the English Channel after dark on the 21st of October last.

After a statement of claim had been delivered on behalf of the plaintiffs, stating that the collision had occurred owing to the *Breadalbane* overtaking the *Conrad* and not getting out of her

way, and that so much damage had been done in the collision that the *Conrad* sank with everything on board her, the solicitor for the defendants, the owners of the *Breadalbane*, delivered a statement of defence and counter-claim, wherein it was alleged by way of defence that immediately before the collision those on board the *Breadalbane* had seen the green light of the *Conrad* about a quarter to half-a-mile off, and about five or six points abaft the port beam of the *Breadalbane*; that therefore the *Breadalbane* had been kept on her course, and a bright light had been shewn over the stern of the *Breadalbane*, but the *Conrad* continued to approach and ran into the *Breadalbane* and did her much damage.

By way of counter-claim the defendants repeated the allegations in the statement of defence, and claimed judgment against the plaintiffs and their bail for damage occasioned to the plaintiffs by reason of the collision.

Dec. 9. The action came on to be heard before the Judge assisted by two of the Elder Brethren of the Trinity House.

Charles Russell, Q.C., and *Myburgh*, for the defendants, applied to the Court to direct that all proceedings in the action should be stayed on the ground that the plaintiffs, the owners of the *Conrad*, had neither given security for the costs of the counter-claim nor put in bail to answer judgment on such counter-claim.

Webster, Q.C., and *W. G. F. Phillimore*, for the plaintiffs.

Phillimore admitted that the owners of the *Conrad* had not given either bail or security for costs, and asked that the hearing of the action might be adjourned. To this application the Court acceded.

Dec. 10. The action was again called on, and bail, or an undertaking in lieu of bail, not having been given on behalf of the owners of the *Conrad*, the Court directed that their names should be struck out of the proceedings, and that the action should proceed as an action by the owners of the cargo of the *Conrad* alone. Witnesses on behalf of the plaintiffs, the owners of the cargo of the *Conrad*, and the defendants were then called and examined in support of the statement of claim and the statement of defence respectively. It appeared from the evidence of the witnesses called on behalf of the plaintiffs that the steering

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compass of the *Conrad* was fitted with two binnacle lamps, and was fixed inside a deck house on the poop of the *Conrad*, but in such a position that the steersman could see to steer by it if he looked through a pane of glass in the after part of the deck house; that on the night of the collision one of the binnacle lamps in question was lighted, and the reflection from the light given out by it, would pass through the pane in the after part of the deck house and would be visible astern to overtaking vessels. It also appeared in evidence that when those on board the *Conrad* had first seen the *Breadalbane* before the collision the foretopsail of the *Breadalbane* had been set, but that it blew away very shortly before the collision. The result of the remainder of the evidence is sufficiently stated in the judgment.

SIR ROBERT PHILLIMORE. This is a case of collision which took place at 11 o'clock on the 21st of October in this year, between a Swedish brig and a sailing ship off the coast of Cornwall, near the Longships lighthouse. The direction of the wind was about S.E. by S. The vessels which came into collision were a brig called the *Conrad* of 322 tons register, bound from Cardiff to Stockholm, with a crew of ten hands and a cargo of coals; and a ship called the *Breadalbane* of 1427 tons register, on a voyage from Hamburg to Cardiff in ballast. The *Breadalbane* ran into the starboard side of the brig and sank her. The action in this case was brought by the owners of the cargo of the *Conrad*, who contended that the collision was caused by the *Breadalbane* neglecting to take proper steps to keep out of the way of the *Conrad*; on the other hand the defendants contended that the collision was caused by the *Conrad* not keeping out of the way of the *Breadalbane*. Now it appears that the *Conrad* was heading about E. by N., and was close hauled on the starboard tack, and that the *Breadalbane* was heading N.E. by E. half E., also close hauled on the starboard tack. The speed of the vessels was between one and two knots an hour. The case of the plaintiffs is that those on board the *Conrad* saw the *Breadalbane* about half-a-mile off, and about four points abaft the starboard beam, and the defendants say that those on board the *Breadalbane* saw the *Conrad* from a quarter to half-a-mile off, and about five or six

points abaft the port beam. The Elder Brethren advise me that if either of these statements be true, considering there was one-and-a-half points of difference between their courses, they were crossing ships and not overtaking ships. But this was not the case set up in the pleadings nor argued before me. The contention of the plaintiffs has been that the *Breadalbane* was overtaking the *Conrad*, and that therefore the *Breadalbane* as the overtaking ship was bound to keep out of the way. A careful consideration of the evidence leads us to the conclusion that the *Breadalbane* was, owing to the loss of her foretop-sail, brought into close quarters with the *Conrad*, and came bodily down upon her and sank her. Now Article 11 of the Regulations for Preventing Collisions at Sea, provides that "a ship which is being overtaken by another, shall shew from her stern to the last-mentioned ship a white light or a flare-up light," and we are clearly of opinion that the *Conrad* did not by carrying a fixed binnacle light in the manner proved in this case comply with the provisions of this article. The article does not provide that the white light mentioned in it is to be a fixed stern light; and the placing of a binnacle light so as to be visible astern in the manner proved in this case cannot satisfy the article, because the light itself could not be seen but only the reflected rays of it. The *Conrad*, therefore, has infringed the article in question, and accordingly must be deemed in fault under the 17th section of the Merchant Shipping Act, 1873, unless her infringement of the article could not by possibility have contributed to the collision. The Elder Brethren, however, are of opinion, and I agree with them, that the infringement of the article in this case could not by any possibility have contributed to the collision. Looking to the whole of the evidence, in our opinion, that on the part of the *Conrad* is the most trustworthy. It only remains for the Court to pronounce which of these two vessels is to blame for the collision. We think that the *Breadalbane* is alone to blame for the collision. And I pronounce accordingly.

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March 7. *Bucknill*, on behalf of the owners of the *Breadalbane* moved the Judge in Court to postpone the hearing of the reference in the action until an appeal, brought on behalf of the

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owners of the *Breadalbane* against the above-mentioned judgment of the 13th of December had been disposed of.

Pyke, for the owners of the cargo of the *Conrad* opposed the motion.

THE COURT directed that the hearing of the reference should be proceeded with without prejudice to the appeal.

Solicitors for owners of the *Conrad* and owners of her cargo: *Ingledew & Ince*.

Solicitors for owners of the *Breadalbane*: *Gregory, Rowcliffes, & Co.*

G. B.

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April 25.

THE CLAN GORDON.

[1881 N. 267.]

Damage—Collision with Pier—Non-liability of Shipowners for negligence of Pilot in charge by compulsion of Law—Harbours Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74—The New Brighton Pier Act, 1864 (27 & 28 Vict. cclxvii.), ss. 2, 39—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 388.

The 74th section of the Harbour Piers and Clauses Act, 1847, which Act is incorporated with the New Brighton Pier Act, 1864, save and so far as any of the clauses and provisions of the two Acts are inconsistent, declares that the owner of every vessel shall be answerable to the undertakers of every pier to which the Harbours Docks and Piers Clauses Act, 1847, is applied, for any damage done to such pier, but provides that nothing therein contained shall extend to impose any liability for such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ. By the 39th section of the New Brighton Pier Act, 1864, it is enacted that if any person having the care of any ship shall wilfully or carelessly cause, permit, or suffer any damage or injury to be done to the New Brighton Pier then and in every such case the owners of every such ship shall be answerable and liable to make satisfaction to the New Brighton Pier Company for all such damage or injury. A steamship came into collision with and did damage to the New Brighton Pier, and to recover for the damage so done the New Brighton Pier Company brought an action against the steamship. The owners of the steamship alleged in their statement of defence that at the time the damage was done the steamship was in charge of a pilot employed by compulsion of law; that the collision was not caused or contributed to by the negligence of the defendants or any other persons than the pilot of the steamship, and that the damage was not permitted or suffered by any persons having the care of the steamship within

the meaning of the New Brighton Pier Act, 1864. The plaintiffs demurred to these allegations in the statement of defence :—

Held, that the provisions of the New Brighton Pier Act, 1864, did not preclude the defendants from setting up the defence of compulsory pilotage and that the demurrer must be overruled.

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THIS was an action of damage instituted on behalf of The New Brighton Pier Company against the steamship *Clan Gordon*.

The statement of claim alleged in substance that the plaintiffs were incorporated by the New Brighton Pier Act, 1864, and were the owners of a pier built under the powers conferred by that Act; that by s. 39 of the same Act, if any person having the care of any ship, boat, or barge, or other vessel, should wilfully or carelessly cause, permit, or suffer any damage or injury to be done to the said pier or works by any such ship, boat, barge, or other vessel, then and in every such case the owner of every such ship, boat, barge, or other vessel was made answerable and liable to make satisfaction to the plaintiffs for all such damage or injury, and that the *Clan Gordon* had on the 9th of October last by the negligence of the person or persons in charge of her come into collision with the said pier and greatly injured it.

The statement of claim further alleged so far as might be necessary that the collision and damage were due to negligence on the part of the servants of the owners of the *Clan Gordon*.

On behalf of the defendants the owners of the *Clan Gordon*, a statement of defence was delivered of which the second, third, and fourth paragraphs were in substance as follows:

2. The defendants deny that the damage proceeded for was caused by the *Clan Gordon* within the meaning of the New Brighton Pier Act, 1864.

3. The defendants also say that before and at the time when the said damage was caused the *Clan Gordon* was in charge of a duly licensed pilot, whom the owners and master of the *Clan Gordon* were bound by law to employ and put their vessel in charge of, within the meaning of s. 74, of the Harbours, Docks, and Piers Clauses Act, 1847.

4. The defendants further say that the collision and damage were not caused or contributed to by any negligence of the defendants or of their servants, or of any person other than the duly

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licensed pilot, who was as aforesaid by compulsion of law in charge of the *Clan Gordon*, and who was directing and controlling the management and navigation of the *Clan Gordon*.

The plaintiffs demurred to the 2nd, 3rd, and 4th paragraphs of the statement of defence.

April 25. *W. R. Kennedy* (*Webster, Q.C.*, with him), for the plaintiffs. The 74th section of the Harbours, Docks, and Piers Clauses Act, 1847, is inapplicable to the New Brighton Pier, for the provisions of that section are inconsistent with the provisions of the 39th section of the New Brighton Pier Act, 1864, and by the 2nd section of the New Brighton Pier Act, 1864, the Act of 1847, and the New Brighton Pier Act, 1864, are only to be incorporated together where the Act of 1847 is not expressly varied or is not inconsistent. The effect of the 39th section of the Act of 1864 is to render a shipowner liable if the master of his ship, in whom the care of the ship still remains though a pilot employed by compulsion of law be on board, suffers or permits the pilot to act carelessly so as to cause damage. If this construction of the section is the right one, it is a question of fact, whether the defendants are not liable for the wrongful act of their master in allowing the pilot to damage the plaintiffs' pier. Apart from statutory provision, it is the duty of a master to take the charge of his ship out of the hands of a pilot who is incompetent or misconducts himself: *The Duke of Manchester*. (1)

Butt, Q.C., *MacLeod, Q.C.*, and *W. G. F. Phillimore*, for the defendants. The 39th section of the New Brighton Pier Act, 1864, a local Act, has not either expressly or by implication repealed either the 74th section of the Harbours, Docks, and Piers Clauses Act, 1847, or the 388th section of the Merchant Shipping Act, 1854, which latter section expressly provides that no owner or master of any ship shall be answerable to any person whatsoever for any loss or damage occasioned by the fault of any pilot employed by compulsion of law: *The Conservators of the Thames v. Hall*. (2) The object of the 39th section of the New Brighton Act was not to alter the law of compulsory pilotage, but to enable the New Brighton Pier Company to recover against

(1) 4 N. of C. 575.

(2) Law Rep. 3 C. P. 415.

the owner of a vessel for damage wilfully done by the master or other servant of the shipowner, and but for the provisions of the section the plaintiffs in the case of damage wilfully done by a master without the scope of his authority would have no remedy against the shipowner: *The Ida* (1); *The Druid*. (2) If this construction be right, it is clear that the 39th section of the Act of 1864 is not inconsistent with, but must be read together with, the Act of 1847, and that consequently the present case is governed by the 74th section of the latter Act which contains an express proviso applicable to cases of compulsory pilotage.

Kennedy, replied.

SIR ROBERT PHILLIMORE. I am of opinion that this demurrer is bad and cannot be allowed. In order to sustain it the counsel, who has argued this case with great ability on behalf of the plaintiffs, was driven to contend that by implication both the 388th section of the Merchant Shipping Act, 1854, and the 74th section of the Harbours, Docks, and Piers Clauses Act, 1847, were repealed. I think that would be a conclusion to which the Court would be very loath to come, and would be very anxious to avoid. I am of opinion that the 74th clause of the Harbours, Docks, and Piers Clauses Act, 1847, remains unaffected by the provisions of the local Act on which the plaintiffs rely, and that the argument urged by Mr. Butt that the words in the 39th section of the new Brighton Pier Act, 1864, "any person having the care of any ship, boat, barge, or other vessel," are not the proper or necessary description of a pilot taken on board by compulsion of law, and were not intended to apply and do not apply to such a pilot, is a sound argument. In the result I am of opinion that the argument of Mr. Kennedy, which, speaking in general terms, is neither more or less than that the general law upon the question of compulsory pilotage is repealed by implication by the 39th section of the new Brighton Pier Act, 1864, cannot be sustained. I must, therefore, overrule the demurrer with costs.

Solicitors for plaintiffs: *Laces, Bird, Newton, & Co.*

Solicitors for defendants: *Bateson, Bright, & Warr.*

(1) Lush. 6.

(2) 1 W. Rob. 391.

G. B.

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May 15.

THE GOLDEN SEA.

Shipping Casualty Appeal—Shipping Casualties Investigations Act, 1879
(42 & 43 Vict. c. 72), s. 2.

Pa 1246
A shipowner, who has appeared as a party at the hearing of an investigation under the Merchant Shipping Acts into the circumstances attending the loss of a ship owned by him, has no right of appeal, notwithstanding that the tribunal investigating the case has given a decision suspending the certificate of the master of the ship, and condemning the shipowner in costs.

The Wreck Commissioner, having been requested to hold an investigation into the loss and abandonment of a British ship, found that the loss of the ship was due to certain improper ballast taken on board her at an English port having been converted into mud by mixture with the water made by her during the voyage, and so choking the pumps that they could not be used, whereby the ship foundered, and for these wrongful acts and defaults suspended the certificate of the master of the ship for three months. The master appealed.

The Probate, Divorce, and Admiralty Division being of opinion that the evidence before the Wreck Commissioner established that the master had authority from his owner to provide ballast for the vessel without restriction as to price, and had been aware of the character of the ballast which she had taken on board, and that the carrying of such ballast contributed to her loss, dismissed the appeal with costs.

ON the 20th of October, 1881, the British sailing ship *Golden Sea*, whilst on a voyage from Bristol to St. John's, New Brunswick, was abandoned by her master and crew, and was totally lost four hours after she had been so abandoned. Afterwards the Board of Trade ordered a formal investigation under the Merchant Shipping Acts into the circumstances attending her abandonment and loss to be held, and caused notices of investigation under rule 5 of the Shipping Casualties Rules, 1878, to be served on her master and on her managing owner.

On the 13th, 14th, and 15th of December, 1881, the formal investigation was held at Bristol before the Wreck Commissioner (H. C. Rothery, Esq.) and nautical assessors. Both the master and managing owner appeared at the inquiry and took part in the proceedings, and at the close of the case the Court suspended the certificate of the master of the *Golden Sea* for three months, and ordered the managing owner of the *Golden Sea* to pay to the solicitor of the Board of Trade the sum of £100 on account of the expenses of the investigation.

Subsequently the following report of the Court was sent to the Board of Trade.

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Report of Court.

The Court, having carefully inquired into the circumstances of the above-mentioned shipping casualty, finds, for the reasons annexed, that the loss of the said vessel *Golden Sea* was due to the improper ballast which she took on board at Bristol, and which, having become converted into mud by the water she made, caused the pumps to be choked and the vessel to founder; but that the abandonment of the vessel when it took place was justifiable.

For these wrongful acts and defaults the Court suspends the certificate of Frederick Bowles, the master of the *Golden Sea*, for three months from this date, and condemns Richard George Guy, the managing owner of the said vessel, in the sum of one hundred pounds (100*l.*) nomine expensarum.

Dated this 15th day of December, 1881.

(Signed) H. C. Rothery,

Wreck Commissioner.

We concur in the above report.

(Signed) Robert Harland, }
R. Methven, } Assessors.

Appended to the report was an "annex" containing a statement of all the material facts of the case, and the grounds on which the report proceeded. The substance of the annex so far as material may be gathered from the judgment of the President set out below.

The master and the managing owner appealed.

April 3, May 8. The appeals were heard together before the President and Sir Robert Phillimore, assisted by two of the Elder Brethren of the Trinity House.

W. G. F. Phillimore, for the managing owner of the *Golden Sea*. Objection will be taken by the respondents that the managing owner has no right of appeal. The right of appeal is conferred by the 2nd section of the Shipping Casualties Investigation Act, 1879, and it is submitted that the words of that

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section are wide enough to include any owner who having been party to the proceedings on a shipping casualty investigation has been aggrieved by the decision of the court investigating the case.

Cottingham, for the master, argued that upon the evidence it did not appear that the loss of the *Golden Sea* was caused by the wrongful act or default of the master within the meaning of the 242nd section of the Merchant Shipping Act, 1854.

Norris, Q.C., and *Danckwerts*, for the respondents, the Board of Trade, objected that the managing owner had no right of appeal, but were not called upon to argue the point. Their arguments were directed to support the finding of the Court of Investigation with respect to the master.

Cur. adv. vult.

May 15. THE PRESIDENT. This is an appeal from a decision of the Wreck Commissioner, suspending the certificate of Frederick Bowles, the master of the *Golden Sea*, for three months, and condemning R. G. Guy, the managing owner of that vessel, in the sum of 100*l.* nomine expensarum. The learned Wreck Commissioner found that the loss of the *Golden Sea* was due to the improper ballast which she took on board at Bristol, and which having been converted into mud by the water she made, caused the pumps to be choked and the vessel to founder. We entirely concur in this finding. The ballast was largely composed of dirt, which was liable to be washed away by the water which came into contact with it. The man who supplied it stated that it was not proper ballast for a ship without limbers, and that the common sense of the master would teach him that it was soluble in water. It was contended that this vessel had limbers, and therefore that there was no reason to suppose that water in ordinary circumstances would come in contact with the ballast; but whether there were what might technically be called limbers or not, we are of opinion that there was not sufficient security against the action of the water upon the ballast in the event of such ordinary incidences of the voyage arising as the master was bound to contemplate and guard against. He himself says, in his evidence, that the pumps sucked at fourteen inches, and that on the previous voyage he noticed that when there were sixteen inches of water in the well.

he would find water over the skin of the vessel. This would at once bring it in contact with the dirt ballast which was laid upon the skin, and the mud that then formed would be carried by the water into the pump well and would gradually choke the pumps. The Wreck Commissioner, with the concurrence of the assessors who assisted him, found that this was what, in fact, took place, and that the consequence was that with such ballast with the water that there was in the vessel between the 14th and the 20th of October, when she was abandoned, it was impossible to keep the pumps clear. In this opinion we, together with our assessors, concur. The only point on which our assessors have felt any doubt is whether the gales which the vessel encountered between the 14th and the 19th did not prevent the master and crew from doing more than was done to keep the pumps clear, and whether, therefore the loss of the vessel must not be attributed to these gales. We, however, are of opinion that, as the improper ballast contributed to the helpless condition in which the ship was on the 19th of October, the master must be held responsible for that condition. It is possible that if the weather had been less severe, and the vessel had not sprung a leak, the pump-well might have been kept clear; but on the other hand, it is impossible to say that if the crew had only had to contend with ordinary water instead of water laden with dirt, they would not have been able to keep the vessel afloat. A master is not justified in proceeding on a voyage across the Atlantic with ballast on board of such a kind and so stowed as to clog the pumps in the event of bad weather making the safety of the vessel depend on their proper action. We think that the event clearly establishes this. The master knew the character of the ballast. He bought it on his own responsibility, and no restriction was placed upon him by his owner as to the price he should pay. We have no doubt that he acted in what he thought was the interest of his owners in obtaining this cheap dirt rather than the better material which could have been obtained at a higher price, but this cannot relieve him of the responsibility for the consequences of his improper selection. We are therefore of opinion that the decision of the Wreck Commissioner as to the master was correct, and we dismiss his appeal.

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With regard to the owner the case is very different. It has been our duty in the interest of the master carefully to investigate all the facts, and we feel bound to say that so far as the case has been presented to us we do not see any reason to impute blame to the owner. But an objection has been taken on behalf of the Board of Trade that no appeal lies from the decision of the Wreck Commissioner condemning the owner. We feel constrained, though with great regret, to give effect to this objection. The appeal to this division is given by the Shipping Casualty Investigations Act, 1879. By the 2nd section of that Act it is enacted, first, that "where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty has been held . . . the Board of Trade may in any case, and shall" in certain cases, order the cause to be reheard; secondly, that "where in any such investigation a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing has not been made, or has been refused, an appeal shall lie from the decision." We are of opinion that the clear meaning of these words is, that the decision from which an appeal is allowed is a decision with respect to the cancelling or suspension of the certificate, and not any other decision. If the reason of the enactment is considered, it confirms the view we take of the construction of the section. The decision of the Wreck Commissioner may deprive the master of the means of earning his livelihood. It was thought fit, therefore, to give the master a right of appeal. If it had been intended to give the owner a right of appeal we cannot conceive any reason why it should be made to depend on whether the master's certificate had been dealt with, for the injury inflicted on the owner by an erroneous decision is the same, whether the master is found to blame or not. It is possible that no appeal was given to the owner because the Wreck Commissioner has only the power to express an opinion on his conduct, and has not directly the power of punishing him. But it is evident that the reflection on the character of the owner arising from an adverse finding against him is of a very serious nature. He has in fact, though not in form, been found guilty of a misdemeanor in sending a ship to sea in such an unseaworthy

state that lives were likely to be thereby endangered. In addition to this he has in effect been subject to a fine, nomine expensarum, of 100*l*. We think that an amendment of the law is called for, and that the right of appeal should be extended to the owner. Entertaining the opinion we have expressed, we are compelled to reject the owner's appeal, but we do so without costs.

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Solicitors for appellants: *Fielder & Sumner*.

Solicitor for Board of Trade: *Murton*.

G. B.

THE LOTUS. (1881 D. No. 431 Fo. 92.)

April 26.*Salvage—Practice—Adequate, but illiberal Tender—Costs.*

In a case of salvage, in which the defendants pleaded a tender and payment into court of 300*l*., the Court pronounced for the tender and condemned the defendants in costs up to the time of payment into court, but made no order as to the costs incurred after that time.

THIS was an action of salvage brought by the owners, master, and crew of the steamship *Dora* against the steamship *Lotus*, her cargo and freight. The owners of the *Lotus* appeared as defendants in the suit, and delivered a statement of defence. The defendants by the statement of defence traversed some of the allegations in the statement of claim, and alleged in the 12th paragraph in substance as follows:—

The defendants tendered to the plaintiffs, and on the 27th of March, 1882, paid into court the sum of 300*l*. for the services rendered to the *Lotus*, her cargo and freight, and submit that the same is ample and sufficient.

The plaintiffs in their reply denied that the sum paid into court, as pleaded in the 12th paragraph of the statement of defence, was sufficient.

April 26. The action was heard.

The services in respect of which the suit was brought mainly consisted in towing the *Lotus*, which had broken her shaft, and when the *Dora* fell in with her, was lying at anchor in twenty-eight fathoms of water off the west coast of France, about sixteen miles from Point Baleines, a distance of seventy-five to eighty

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miles, into a place of safety off Pauillac, at the mouth of the Bordeaux river, where the two vessels arrived about sixteen hours after the towage commenced.

For the purposes of the suit the value of the *Dora*, her cargo and freight, was taken to be 25,000*l.*, and the value of the property proceeded against 20,000*l.*

Myburgh, Q.C., and *W. G. F. Phillimore*, for the plaintiffs.

Butt, Q.C., and *Stewart*, for the defendants.

SIR ROBERT PHILLIMORE. Looking to the circumstances of this case, I am of opinion that the tender is adequate, though not liberal. There is a question of some importance as to costs. I find that my predecessor, Dr. Lushington, in the case of *The William* (1), upon the subject of costs, said: "I have considerable difficulty upon the subject of costs. In ordinary cases, the rule of the Court of Admiralty has been this; If a tender is made and rejected, which is afterwards pronounced sufficient, it ought to be followed by condemnation of the salvors in the costs, and no doubt if I look to the practice of the other Courts—I allude particularly to the opinion expressed by Lord Cottenham and the Master of the Rolls—costs are not given with a view of punishment, but as a matter of justice to the other party. I have considered how far this doctrine is applicable to cases of salvage, and I confess I have great difficulty in applying it with all its rigidity to such cases, for this reason: in the very nature of salvage services, there is something so loose and indefinite, and so difficult to be determined by the best constituted minds, when looking at their own case, that I am not inclined to press the doctrine to its full extent. Where there has been an offer on the face of the proceedings so large that it ought to have been accepted, I must administer justice in conformity to the rule I have mentioned. In the present case, however, whilst I certainly think the tender ought to have been accepted, yet, at the same time, looking at the value of the property and all the circumstances, I do not think that I ought to deprive the salvors of all reward; nor do I think it would be for the interest of the public if I were to do so; because it is desirable to hold out

(1) 5 N. of Cas. 108.

a degree of extra encouragement, if I may say so, for the preservation of property. Upon the whole, therefore, in this case, though it is with some doubt, I do not condemn the salvors in costs." Dr. Lushington therefore held, in that case, that in a cause of salvage where the tender was sufficient but not liberal, he had a discretion in the matter of costs. The exercise of this discretion as to costs is not affected either by the Judicature Acts or the rules of the Supreme Court, and I shall give the salvors in this case their costs up to the time when the money was paid into court, and I shall make no order as to the costs after that time.

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Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*

Solicitors for defendants: *Walker, Son, & Field.*

G. B.

THE MARY. (1881 G. 673.)

May 23.

Collision—Practice—Both Ships to blame—Costs of Reference.

Where in an action of damage the defendant sets up a counter-claim relating to the collision in respect of which the action is brought, and both ships are held to blame, and a reference is ordered to ascertain the amount of damage sustained by each ship, each party is, as a general rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed.

THIS was an action of damage carried on on behalf of the owners of the steamship *Violet* against the steamship *Mary*.

The owners of the *Mary* appeared as defendants in the suit, and delivered a statement of defence and counter-claim, claiming by way of counter-claim the damages occasioned to them by reason of the collision in respect of which the action was brought; and on the 3rd of May, 1881, the Court pronounced that the collision in question was occasioned by the default of the master and crew of the *Violet*, and by the default of the master and crew of the *Mary*; condemned the owners of the *Mary* and their bail in a moiety of the plaintiff's claim in respect of the damages occasioned by the collision, and the owners of the *Violet* and their bail in a moiety of the defendants' counter-claim in respect of the said damages, and referred the said damages to the registrar, assisted by merchants to assess the amount.

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Subsequently the owners of the *Violet* brought in their claim, amounting to 944*l.* 15*s.* 9*d.*, and the owners of the *Mary* their counter-claim amounting to 571*l.* 14*s.* to the registry; and on the 14th of April last the registrar reported that the owners of the *Violet* and the owners of the *Mary* had respectively sustained loss or damage by reason of the collision aforesaid to the extent of 775*l.* 13*s.* 3*d.* and 4672*l.* 8*s.* 5*d.* respectively.

No recommendation was made by the registrar as to how the costs of the reference should be borne.

Bucknill, on behalf of the defendants, moved the judge to order that the plaintiffs do pay the defendants' costs of the reference so far as regards the defendants' counter-claim, and to condemn the plaintiffs in the costs of the motion. Ever since the Court of Appeal decided in the case of *The Consett* (1) that the costs of and incident to references in damage suits in this Court must be dealt with as the costs of a fresh litigation and independently of the result of the issues tried in Court, it has been the settled practice in cases similar to the present, where less than one-fourth the amount of a plaintiff's and defendant's claim or counter-claim has been disallowed, that the parties bringing in such claim or counter-claim should have their costs of the reference: *The Savernake*. (2) In the present case there are no peculiar circumstances, and no sufficient reason can be shewn for refusing to grant the motion. The defendants on their part are prepared to pay the costs of the reference so far as regards the claim of the plaintiffs.

W. G. F. Phillimore, for the plaintiffs, opposed the motion. There is no reported decision of this Court as to how the costs of the reference in a damage suit are to be borne in cases where both vessels have been found to blame, and both the plaintiffs and defendants have attended the reference and have succeeded in proving that they are entitled to more than three-fourths of the damages respectively claimed by them. In the case of *The Consett* (3) nearly half of the defendants' claim was disallowed by the registrar, and this Court in making the order as to how the

(1) 5 P. D. 77.

(2) 5 P. D. 166.

(3) 5 P. D. 229.

costs of the reference should be borne expressly refrained from
laying down any general rule.

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SIR ROBERT PHILLIMORE. In this case I must follow the decision of the Court of Appeal in the case of *The Consett* (1), and applying the principle laid down in that decision, I think that that portion of the motion which asks for payment of the costs of the reference so far as regards the counter-claim is a proper application, and that it ought to be granted. With respect to the remainder of the motion, I think in the circumstances that the plaintiffs and defendants should each bear their own costs on this application before me to-day. There will, therefore, be no order as to the costs of the motion.

W. G. F. Phillimore applied that the costs of the reference so far as regards the plaintiffs' claim should be paid by the defendants.

SIR ROBERT PHILLIMORE. Yes; the plaintiffs ought to have the costs of substantiating their claim.

Solicitors for plaintiffs: *Pritchard & Sons*.

Solicitor for defendants: *W. Batham*.

G. B.

[IN THE COURT OF ADMIRALTY OF THE CINQUE PORTS.]

April 20.

THE MARIE.

Salvage—Misconduct of Salvors diminishing amount of Reward.

Violent and overbearing conduct on the part of salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, will yet operate to induce the Court to diminish the amount of the reward.

THIS was a cause of salvage instituted on behalf of the owners, master, and crew of the lugger *Lady Compton*, and the owners, master, and crew of the steam-tug *Lord Palmerston*, against the French brig *Marie*, her cargo and freight. The suit was entered in the sum of 800*l.*, but an appearance having been entered on behalf of the owners of the *Marie*, as defendants, on their application the

(1) 5 P. D. 77.

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Marie was released on bail in the sum of 400*l.*, and with the consent of all parties the judge directed that for the purpose of saving expense the cause should be heard without pleadings.

April 19, 20. On these days the cause was heard before the judge (Arthur Cohen, Esq., Q.C.). Witnesses were examined orally in court on behalf of the plaintiffs and the defendants.

The substance of the evidence appears from the judgment.

Glyn, for the plaintiffs, cited *The Dosseitei* (1); *Hartford v. Jones* (2); *Nicholson v. Chapman*. (3)

W. G. F. Phillimore, for the defendants, cited *The Lady Worsley* (4); *The Martha* (5); *The Dantzic Packet* (6); *The Black Boy* (7); *The Champion*. (8)

THE JUDGE. This is an action of salvage brought by the plaintiffs the owners, master, and crew of the lugger *Lady Compton*, and the owners, master, and crew of the tug *Palmerston* against the owners of the French brig *Marie*, of 108 tons register, laden with a cargo of stone and with her cargo and freight of the value of 550*l.* There are many facts in the case which are not at all in dispute. On the 26th of March last there was blowing an extremely heavy gale, and the *Marie* was in the neighbourhood of other vessels in the Downs. One anchor was slipped to avoid a collision, and then a second anchor was let go when she began to drive, and then that was also slipped. Under these circumstances, I think that the vessel was in distress and was in danger. A signal was hoisted on board the *Marie*, those on board the *Lady Compton* perceived the signal and went up to the brig, and ten men boarded the brig. The brig was got before the wind, and when they got round the South Foreland, a tug, which proved to be the *Lord Palmerston*, was hailed by the master of the lugger. An arrangement was made that the tug was to tow the brig and hold her in the roads; and it was agreed that the *Lord Palmerston* was to receive a proportion of the salvage remuneration. The tug took hold of the brig at about half-past 10 o'clock and towed her

(1) 10 Jur. 865.

(2) 1 Ld. Raym. 393.

(3) 2 H. Bl. 254.

(4) 2 Spks. 256.

(5) Sw. 489.

(6) 3 Hagg. 385.

(7) 3 Hagg. 386, n.

(8) Br. & L. 69.

until about a quarter to 12 o'clock, and then held her till the tide suited and ultimately took her into Dover harbour. As to the facts which I have just mentioned, the evidence leaves no doubt. I am of opinion that these services rendered by the master of the lugger and the tug were salvage services, because the brig was in distress and in danger. But I am also of opinion that the services did not require much skill and labour and involved no risk at all. The services lasted but a very short time. I think that the services of ten men as salvors were by no means required; and I am of opinion that the master of the *Marie* when he signalled did not mean to signify more than that he wanted no other service than the services of a man who could pilot his vessel. If he had had a pilot on board all that he desired could have been done. There was no skill involved, and there was no necessity for those ten men to board this small brig; and I therefore do not think it right to award any larger amount of salvage remuneration than it would have been the duty of the Court to award if only three men had boarded the brig. I come now to the services of the tug. The weather was not bad for the tug. She towed the vessel a short distance and held her for about two hours. The brig was not in danger. But then it is said that all salvage remuneration in this case has been forfeited by misconduct, and that the conduct of the salvors was throughout violent, overbearing, and threatening. I believe that the evidence of the master of the brig is substantially true: that what he wanted was the service of some person who could pilot the vessel to Dover Roads, and he did not require the services of ten men to assist in the navigation of his vessel. I am however willing to assume that until Mr. Hodges, the agent, came on board, there was a misunderstanding between the salvors and the master of the brig. It is not quite certain what the master of the *Marie* intended to do, but I am willing to assume that he intended to go to Dover Roads and remain there until he could get an anchor and chain, and that what was done up to the time when Mr. Hodges came on board was not done contrary to the intentions of the master of the brig; but I am also of opinion that after Mr. Hodges came on board the master and crew of the lugger did act in a violent and overbearing manner towards the master of the brig, and insisted on having their own

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1882 way. It appears to me that a court of justice ought to express
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brig, and who undoubtedly intended to have their own way, what-
ever the captain of that small vessel might do. On the other
hand I am also of opinion that that misconduct is not such criminal
misconduct as should lead to an entire forfeiture of salvage reward.
In the case of *The Atlas* (1) it was held in substance that wilful or
criminal misconduct of salvors may work a forfeiture of salvage,
but that mere misconduct other than criminal, even though it
occasion loss, will only work a diminution of reward. I cannot
say that there was in this case wilful or criminal misconduct
within the meaning of the judgment in *The Atlas*. (1) I entertain
considerable doubt whether the master of the brig has sustained
any pecuniary loss at all by what was done by the salvors, and
see no reason to believe that the salvors did that which occasioned
any extra expenditure. On the whole, taking into consideration
the opinion of Dr. Lushington in the case of *The Atlas* (1), it is
impossible to hold that what was done by the salvors worked a
forfeiture of the whole of their remuneration; but I think that
the plaintiffs' improper conduct during part of the time when
they were rendering salvage services should lead the Court to
diminish the amount to which otherwise they would have been
entitled, and I therefore award to the plaintiffs 70% and costs.

I observe with regret that no tender has been made in this
case, but I do hope that in future tenders will be made in cases
where the services are similar to those in the present case. I
also think it would be very desirable that in cases where tenders
have been made, plaintiffs should consider the advisability
of naming a sum which, having regard to the amount of the
tender, they would be prepared to receive in discharge of their
claim. In this way many of these cases might be settled out of
court, and thereby great expense saved to all parties, especially
as the Court would give costs with reference to the amount so put
forward by the respective parties as a proper salvage remuneration.

Solicitors for plaintiffs: *Mowll & Mowll*.

Solicitors for defendants: *Lowless & Co*.

(1) Lush, 518.

G. B.

THE FAMENOTH.

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May 18.

Shipping casualty Appeal—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432—"Wrongful act or default"—Fresh Evidence on Appeal—Costs.

On a shipping casualty appeal where it is desired to adduce fresh evidence at the hearing of the appeal, application for leave to do so should be made to the Court of Appeal by motion prior to the hearing of the appeal.

An error of judgment on the part of the master of a vessel at a moment of great difficulty and danger does not amount to a wrongful act or default, within the meaning of the 242nd section of the Merchant Shipping Act, 1854, so as to justify the suspension or cancellation of the master's certificate.

On a successful appeal the Board of Trade having appeared in support of the decision appealed from were directed to pay the costs of the appeal.

THIS was an appeal under the 2nd section of the Shipping Casualties Investigations Act, 1879, against a decision of the Wreck Commissioner (H. C. Rothery, Esq.), and assessors with respect to the suspension for three months of the certificate of the appellant William Cowan Auld, late master of the sailing ship *Famenoth*. The decision appealed against was given on the conclusion of a final investigation held at Westminster on the 27th and 28th of April into the circumstances attending the stranding of the *Famenoth*. The *Famenoth* was stranded on the Pan Sand off Whitstable, on the 27th of March, 1882, and four of her crew and a Trinity House pilot left her in one of her boats to transfer some of her passengers to one of three steam-tugs in attendance. After the passengers were safely transferred, the boat went adrift and those in it were drowned.

The report of the Wreck Commissioners made to the Board of Trade was in terms as follows:—

"The Court, having carefully inquired into the circumstances of the above-mentioned shipping casualty, finds, for the reasons annexed, that the stranding of the said ship was due to her having been kept on a S.S.E. course for too long a time, instead of being laid on an E.S.E. course immediately after passing the West Girdler Buoy, heading for the Prince's Channel; and that the blame for the vessel having gone ashore rests with Edward John Taylor, the pilot, who was in charge of her at the time, but was subsequently drowned.

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The Court is further of opinion that William Cowan Auld, the master of the *Famenoth*, is to blame for having kept the three steam-tugs, the *Benachie*, *Daring*, and *Victoria*, in attendance on the vessel, instead of sending one of them off to the assistance of the five men who had gone adrift in the *Famenoth's* boat, the vessel herself being in no immediate danger, whereas the five men were in imminent risk of losing their lives.

“For this wrongful act and default the Court suspends the certificate of the said William Cowan Auld for three months.

“The Court is not asked to make any order as to costs.

“Dated this 28th day of April, 1882. H. C. Rothery, Wreck Commissioner. We concur in the above report. Benjamin S. Pickard, George William Ward, R. Wilson, Assessors.”

Appended to the report was an annex, signed by the Wreck Commissioner and the assessors, which, after describing the circumstances attending the drifting away of the *Famenoth's* boat, and discussing the point whether the master of the *Famenoth* had done or omitted any act which conduced to the loss of the five men in such boat, concluded with the following passage:—

“The whole responsibility in our opinion for the loss of the lives of these five men rests with the master of the *Famenoth*. He had two steamers, the *Benachie* and the *Daring*, alongside of him, and the *Victoria* was fast coming up; all the female passengers and children had been transferred to the *Benachie* and the *Daring*; his vessel was in no immediate danger; whereas he must have known, if he had thought of it, that the occupants of the boat would be in very great danger. As soon therefore as the *Benachie* had got back to him, he ought to have sent her to pick up the boat before it could reach the sands, over which it was no doubt driven, and where these unfortunate men in all probability perished; and for not having so done, we think that he is very greatly to blame.

“I think that I have now answered all the questions which we have been asked . . . and the last point which we have to decide is whether we are to accede to the application . . . that we should deal with this master's certificate. The master stated that it had never occurred to him to send the steam-tug after them, but in

the opinion of the assessors it ought to have occurred to him. This is not a mere error of judgment, it is an act of negligence which has resulted in the loss of five valuable lives; and under these circumstances the assessors think that they would not be doing their duty unless they marked their sense of the master's conduct by suspending his certificate, and notwithstanding the very high character which we are told his owners are prepared to give him, and the time during which he is said to have been in their service, we think that we cannot do less than suspend his certificate for three months from this day. The Court was not asked to make any order as to costs."

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The notice of appeal served on the Board of Trade alleged in substance that the decision of the Wreck Commissioner and assessors, so far as it found that the appellant had been guilty of negligence in not ordering the *Benachie* to follow the boat of the *Famenoth*, and in suspending the certificate of the appellant, was wrong, because the evidence before the Court did not justify the finding of any wrongful act or default on the part of the appellant.

May 8. *W. G. F. Phillimore*, on behalf of the appellant, moved the Court (The President and Sir Robert Phillimore), for leave to adduce fresh evidence on the hearing of the appeal. The fresh evidence the appellant desires to adduce relates to the issue whether the loss of those on board the boat was caused by the wrongful act or default of the appellant. The appellant was not aware until the case was actually being heard at Bristol that the Board of Trade made any charge against him in respect of his conduct after the *Famenoth* had stranded.

Israel Davis, on behalf of the Board of Trade, opposed the motion.

THE PRESIDENT. We have decided to give the appellant leave to produce on the hearing of the appeal, the further evidence which he has asked to be allowed to bring before us, but it must be understood that it will be a question for consideration hereafter how the costs should be borne. We think that it is right that the application for leave to give further evidence

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should have been made now rather than at the hearing of the appeal.

May 15. The appeal came on for hearing before the Court (The President and Sir Robert Phillimore), assisted by two of the Elder Brethren of the Trinity House.

The *Admiralty Advocate* (Dr. Deane, Q.C.), and W. G. F. Phillimore, for the appellant.

Israel Davis, for the Board of Trade.

In pursuance of the leave given by the Court as above stated, two passengers who had been on board the *Famenoth* on the occasion of her stranding, and had then heard a conversation which had taken place between the master of the *Famenoth*, and the master of the *Benachie* were called and examined as witnesses on behalf of the appellant. The result of their evidence and of the evidence taken in the Court below is, so far as material, stated in the judgment of this Court.

Cur. adv. vult.

May 18. THE PRESIDENT. This is an appeal from a decision of the Wreck Commissioner, by which he found W. Cowan Auld, the master of the *Famenoth*, to blame for keeping three tugs in attendance on his vessel, instead of sending one of them to the assistance of five men who had gone adrift in the *Famenoth's* boat, "the vessel herself being in no immediate danger, whereas the five men were in imminent risk of losing their lives." The master's certificate was suspended for three months. The *Famenoth*, of the Port of Aberdeen, was, on the 27th of March last, being towed down the river from the Nore by a tug called the *Benachie*. She had a crew of twenty-four hands, all told, and more than twenty passengers on board. She was in charge of a duly licensed Trinity pilot named Taylor. A violent gale from the north-west having come on, the *Famenoth* was driven broadside on the Pan Sand. The blame for this has been found to rest with the pilot who was afterwards drowned. What occurred after the vessel struck is clearly stated in the Wreck Commissioner's report in the following passage:

"As soon as it was seen that the vessel was hard and fast, the

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captain of the *Famenoth* began to take measures to provide for the safety of his passengers, and with this view orders were given to get out the starboard lifeboat, but before this could be done a sea struck her and stove her in ; upon which orders were given to get out the gig, which was done, and the second and third mates, one able and one ordinary seamen, having got in, some six or seven of the female passengers and children were put into her ; Taylor, the pilot, also got into her, but apparently without any orders from the captain. The boat then pushed off, and having got alongside the *Benachie*, which was lying off at a short distance to leeward, a rope was thrown to her, and all the passengers were then transferred to the *Benachie*. The master of the *Benachie* then hailed the men in the boat to take a turn round one of the thwarts of the boat, saying that he would tow them back to the ship ; and shortly afterwards, thinking that the boat was fast, the master of the *Benachie* gave orders to go ahead ; unfortunately, however, the rope in some way or other slipped, and the boat went adrift, and she began to drift towards the sand. On seeing which, the master of the *Benachie* at once backed astern until he was in ten feet of water, when fearing to get his vessel aground he put her ahead again ; but the boat herself, notwithstanding the efforts of her crew to pull her to windward so as to regain the ship was carried by the force of the wind and sea over the sand, and when last seen they were on the other side of the sand, but were still pulling to windward. The *Benachie* then returned to the *Famenoth*, but in the meantime another steam-tug, called the *Daring*, had come up and the remainder of the female passengers having been put into the damaged lifeboat, they were sent off, and taken on board the *Daring*. When, however, the *Benachie* came alongside, the captain of the *Famenoth* told the master of the *Benachie* to pass his tow rope on board, and a third tug, the *Victoria*, having also come up, all three passed their tow ropes to the *Famenoth* and began to tow. Up to this time the vessel was making no water, but they had hardly been towing for more than five minutes, when it was reported that she was filling fast, upon which the captain ordered them to cease, and the tow rope was slipped. The *Benachie* was then ordered to come alongside to take off the remainder of the passengers and crew ; this she

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succeeded in doing, but not without considerable difficulty, at the same time smashing her sponson; and between 1 and 2 o'clock all hands had left the *Famenoeth* and gone on board the *Benachie*."

On these facts eighteen questions were put by the Board of Trade. The only one which it is necessary to consider is the fourteenth, whether after the gig left the *Benachie* the master of the *Famenoeth* did or omitted any act, the doing or omission of which conduced to the loss of the gig and those in her. On this point the Wreck Commissioner's judgment is as follows:

"But then the question arises, ought not some effort to have been made to follow the boat and pick her up? When the *Benachie* ceased following the boat over the sand she returned to the *Famenoeth*; but in the meantime the *Daring* had come up, and the master of the *Famenoeth* then desired them to pass their tow ropes on board, which they did, as did also the steam-tug *Victoria*, which came up shortly afterwards, and all these steam-tugs then began to tow the vessel, but had to leave off a few minutes afterwards owing to the *Famenoeth* filling with water. During all this time the boat was, no doubt, being driven before the gale, notwithstanding all the efforts of her crew to keep her to windward. Now it certainly does appear to us that either the *Benachie* or one of the other steamers should have been sent round the Sand to look after the boat and pick her up; for at this time all the female passengers and children had been safely transferred, part of them to the *Benachie*, part to the *Daring*; the *Famenoeth* had two steam-tugs in attendance upon her, and a third was fast coming up, and the vessel herself was in no immediate danger. With the wind and tide as they then were, one of these steam-tugs could have run round to the south of the Pan Sand in a few minutes, and without any risk to herself or to those on board her; and had she been sent off at once, she would in all probability have picked up the boat long before it had reached the sands, and have rescued the men in her; and to us it is inconceivable why this was not done."

The decision of the Wreck Commissioner rests upon these two propositions, that the master of the *Famenoeth* kept the tugs in attendance instead of sending one of them after the boat and that

his vessel was in no immediate danger. It appears from the evidence that when the boat was seen to be adrift the master of the *Famenoth* signalled to the master of the *Benachie* to go after her, which he did ; but before he could reach the boat the tug herself touched the ground. The boat continued to drive through the breakers over the sand into the open water beyond. The *Benachie* finding that she could not follow the gig returned towards the *Famenoth* to pick up another boatload of passengers who were being embarked in the damaged lifeboat of the *Famenoth* ; but as another tug, the *Daring*, had just arrived, it became unnecessary for the *Benachie* to take any passengers on board. The captain of the *Famenoth*, who had been engaged in getting the rest of the women and children into the lifeboat, while the *Benachie* was going after the gig, upon the tug returning asked the captain why he had not gone to the gig ? and he stated that he had gone as far as the draught of water would allow him, and this was the fact. This evidence of the captain given before the evidence affecting him was put in by the Board of Trade is confirmed by two witnesses who have been called before us. They say that the master of the *Famenoth* said, " Can't you do anything more for that boat ? " The answer was, that he could not go any farther after her. It has been observed that these witnesses fix the time of this incident later by the clock than the return of the *Benachie* from following the gig, but one of them expressly says that it was at that time, and we have no doubt that this is correct. In any case it confirms the inference we draw from the evidence of the captain of the *Benachie* that he was not prevented from going round the sand by the orders of the master of the *Famenoth*, but that it did not occur to him that it might be of use. Up to this point, therefore, no blame attaches either to the captain of the *Benachie* or of the *Famenoth*. But it is said that the captain of the *Famenoth* ought at once to have sent the *Benachie* round the sand, and that instead of doing so he detained the tug to attend on him, and the Wreck Commissioner finds that no blame attaches to the captain of the tug because he was bound to obey the orders from the *Famenoth*. But the captain of the tug does not excuse himself on this ground. He was asked, " Finding that the boat had driven across the sands ought you not to have run down the channel by

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the North Tongue or round the sand a little farther to meet this boat driving down the channel and picked her up?—A. Yes, it might have been done. Q. If you had gone round you would have caught the gig before she would have been driven on to the Margate Sands, would you not?—A. I do not say that. Q. Did it not occur to you that it was a proper thing to do?—A. No, or I should certainly have done it. The mode of getting round the sand by the channel by the North Tongue suggested in this question would have been useless, for it would have taken the tug a course of many miles to get round. But it has with more reason been argued that the tug might have gone round by the western end of the Pan Sand. This we are informed by our assessors would have taken the tug a course of about three miles to bring her to the tail of the sand on the track of the gig. But whatever course it would have been possible to take, the answer of the tug master is distinct that, if it had occurred to him that it was the proper thing to go round the sand, he would certainly have done so. This clearly shews that he did not feel restrained by any orders of the master of the *Famenoeth* from going after the gig. But in fact it did not occur to him to suggest to the master of the *Famenoeth* that he could by going round the sand have a chance of overtaking the gig.

The question then arises whether there was culpable negligence on the part of the master of the *Famenoeth* in not ordering the *Benachie* to go round the sand. It was clear that when his immediate anxiety as to the gig was relieved by seeing her on the other side of the sand, he turned his attention to saving the rest of the women and children. It does not appear, and there is no reason to suppose, that he had any special knowledge of the sands and the channels around them. He had lost the pilot, who was in the gig; and the deep sea pilot who was on board did not suggest that the tug could go round the sand, and, as we have seen, the master of the *Benachie* did not suggest it. It is true that by looking at the chart we can now see a course that might have been taken round the sand, but we think that it cannot be imputed to the captain as culpable negligence that he did not see at the time that such a course might have been followed with a chance of success. We are of opinion that the master

of the *Famenoth* did not recklessly detain the tug knowing that it could have usefully followed the gig, but that not knowing that she could do so he employed her with the other two tugs in an endeavour to get his vessel off the sand. It is not disputed that this was a proper course for him to take apart from the question of the propriety of his conduct with reference to the gig. It is unnecessary to refer more in detail to the non-employment of the *Daring* and the *Victoria* to look for the gig. If any one of the three tugs ought to have been sent it would have been best to send the *Benachie*, as the masters of the other tugs did not know that the gig had gone adrift. But further we are of opinion that the *Famenoth* was, and all on board her were, in immediate danger. That the captain of the *Famenoth* thought so is shewn by his transferring the passengers into the tugs; but it is proved that it was blowing a hurricane at the time, and the vessel was being fast embedded in the sand. We are advised, and without such advice we should have thought it manifest, that the *Famenoth* and all on board her were in great and imminent peril, and, in fact, within a few minutes after the tugs began to tow, the *Famenoth* was found to be filling fast. In such circumstances no one could predict what would happen to her. The fact that the *Famenoth* was afterwards got off can make no difference in our consideration of the position in which her captain was at the time. He could have no assurance that the vessel and all on board her would not be lost if he had not availed himself of the help of the tugs which he had at hand. We ought to add that our assessors are of the opinion, in which we concur, that in the circumstances the utmost that can be said against the behaviour of the captain of the *Famenoth* is that it manifested an error of judgment at a moment of great difficulty and danger, but that it did not amount to any act of culpable negligence. We therefore think that the judgment was erroneous and must be reversed.

The Admiralty Advocate. In accordance with the decision of this Court in *The Arizona* (1) and other cases, the appellant, it is submitted, is entitled to the costs of the appeal.

Israel Davis. The question as to how the costs incidental to

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and occasioned by the admission of further evidence on the appeal should be borne has been reserved. It is submitted that at least the Court ought not to direct the Board of Trade to pay these costs.

THE PRESIDENT. Undoubtedly the Court intimated at the time that, while admitting additional evidence, it would depend upon the effect of that evidence whether or not the costs would be given to either of the parties. That is to say, if the ultimate decision of the case had turned upon the additional evidence, then undoubtedly it would have been a reason for not allowing the costs although the appeal was successful; but in this case the additional evidence, was only relied upon for the purpose of confirming the inference which we draw from the original evidence.

The learned counsel for the Board of Trade has spoken of a direction that the Board of Trade should pay the costs of the appeal as being unfair to the Court below, which had not the additional evidence before it. It must be remembered that it is a course which the law allows when, instead of a simple appeal, it permits a rehearing, which is the case here; therefore in no proper sense of the word can it be said to be unfair. The object of all tribunals is to arrive at the truth and justice of the case before them, and that must be in some cases attained by receiving additional evidence. We see no reason for saying that this evidence was kept back. The charge against the captain was only developed when all the evidence had been given. The two witnesses who have been called before us are not shewn to have been present at the hearing before the Wreck Commissioner; I do not think there was any suggestion that they were present. They were not seafaring people, but it turns out that they happened to be standing by the captain at the time when the boat drifted away, and they were able to confirm by their evidence the truth of the statement which the captain himself had made.

We therefore think that there is no reason why the usual rule should be departed from in this case.

It has been mentioned that we have not only in the case which immediately preceded this (1), but in other cases, given the Board

(1) *The Golden Sea*, supra, p. 194.

of Trade the costs when it has succeeded. We must apply the same rule in favour of the appellant when the Board of Trade is unsuccessful.

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Solicitors for appellant: *Lowless & Co.*

Solicitor for Board of Trade: *Murton.*

G. B.

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*Damage—Duty of Vessels anchored in Track of Launch—Compulsory Pilotage—
The Mersey Docks Consolidation Act, 1858 (21 & 22 Vict. c. xcii.) s. 139—
Meaning of “Proceed to Sea.”*

A barque was at anchor in the Mersey in the way of the *C.*, a vessel about to be launched. The launch was delayed as long as was prudent, but the barque not having been got out of the way in time was struck by the *C.* in coming off the ways and both vessels were damaged. Reasonable notice had been given of the launch, and a steam-tug had been sent by those superintending the launch to tow the barque out of danger, and would have done so in time to have prevented the collision but for the obstinacy of those on board the barque:—

Held, that the barque was alone to blame for the collision.

The barque had been towed out of dock into the river the previous day in order that she might proceed to sea before daybreak on the morning on which the collision happened. But an accident having happened to the mainyard of the barque she was unable to proceed to sea as intended, and at the time of the collision was waiting in the river to have repairs executed. She had on board of her a duly licensed Mersey pilot:—

Held, that she was not at the time of the collision proceeding to sea within the meaning of the Mersey Docks Consolidation Act, 1858, s. 139, and that the pilot on board her was not at the time employed by compulsion of law.

Rodrigues v. Melhuish (10 Ex. 110) followed.

THIS was an action of damage instituted on behalf of the owners, master and crew of the barque *Gladstone* against the vessel *Cachapool*.

The statement of claim alleged, inter alia, substantially as follows:—

1. On the 8th of August, 1881, the *Gladstone*, which was a barque belonging to the port of South Shields, left the Salthouse Dock, Liverpool, manned by a crew of eleven hands all told, and in charge of a duly licensed pilot for the port of Liverpool. The *Gladstone* was bound for Viborg in Russia.

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2. Shortly after leaving the said dock, and whilst in the course of proceeding to sea on the said voyage, the said barque was by directions of the said pilot brought to an anchor in the river Mersey about abreast of Tranmere Ferry landing stage.

3. At about 10 A.M. on the 9th of the said month, the weather was fine and clear with a fresh breeze from about north-west by north, and the tide was last quarter flood and of the force of about four knots, and the *Gladstone* was lying at anchor in the same place, when a tug called the *Hercules* came to the *Gladstone* and told those on board her that a launch was going to take place from a building yard on the Cheshire side of the river, and asked the pilot of the *Gladstone* if the said ship was not in the way. The *Gladstone* could not then be moved without assistance, and those on board inquired if the *Hercules* had authority to and would help to move her.

4. The *Hercules* which was in attendance at the launch and employed by the defendants and their servants who had the conduct thereof declined at that time to render any assistance in moving the *Gladstone*, and went away.

5. Shortly afterwards the *Hercules* returned to the *Gladstone*, and at the request and by the direction of those on the said tug the tow rope of the *Gladstone* was passed on board the *Hercules*, which commenced to tow the barque and the helm of the *Gladstone* was ported to sheer her out into the river, but the *Hercules* getting out of position slipped the hawser.

6. The hawser was then again passed on board the *Hercules*, which again began to tow, but before the *Hercules* had towed the *Gladstone* ahead of her anchor, the launch, which proved to be the *Cachapool* belonging to the defendants, left the ways and approached the *Gladstone* at great speed and caused risk of collision, and notwithstanding orders were given to veer away the *Gladstone's* chain the *Cachapool* with her stern struck the *Gladstone* on the port side doing so much damage that the *Gladstone* sank almost immediately, and with her cargo and the effects of her master and crew became a total loss.

7. Those in charge of the *Cachapool* and of the said launching operations improperly neglected to keep a good look out.

8. The *Cachapool* was improperly launched, having regard to

the position of the *Gladstone*, prior to and at the time of the said launch and the state of the wind and tide.

9. Those in charge of the *Cachapool* and of the said launching operations, improperly neglected to supply the *Cachapool* with efficient anchors and cables and improperly neglected to take proper measures and precautions for checking, controlling, arresting or directing the course and speed of the *Cachapool*, and improperly neglected before the collision to bring her up or to keep her clear of the *Gladstone*.

10. Those in charge of the *Cachapool*, and of the said launching operations improperly neglected to give due notice of the said launch taking place, and improperly neglected to take due and proper precautions for the safety of vessels lawfully in the neighbourhood of the said launch.

11. The said collision, and the damages consequent thereon, were caused by the neglect or default or want of proper care and skill on the part of those having charge of the *Cachapool*, and of the said operations for launching her, and were not caused or contributed to by those on board the *Gladstone*.

The defendants, the owners of the *Cachapool*, delivered a statement of defence and counter-claim, which, after stating that about 9 A.M. on the 9th of August, 1881, the time appointed for the launch, the *Hercules* had been sent to warn the *Gladstone* to move out, but that those on the *Gladstone* had neglected to do anything, alleged in the 3rd and subsequent paragraphs as follows:—

3. Later on the *Hercules* returned to the *Gladstone* and offered to tow her out of danger, and asked for a hawser. After some delay those on board the *Gladstone* passed a hawser on to the *Hercules*, which at once began towing her out of the way to the north and east, but in consequence of those on board the *Gladstone* neglecting to assist by heaving on their anchor, the *Hercules* got out of position, and had to slip the hawser.

4. The *Hercules* went back to the *Gladstone* to get her hawser again, but those on board the *Gladstone* then for a long time refused to give the *Hercules* a hawser. When they did give the *Hercules* a hawser again she at once went ahead, towing to the north and east, and the *Gladstone* was moved ahead by her.

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5. When those in charge of the launch saw the *Gladstone* being thus towed ahead, it was considerably past the time appointed for the launch, which could not with safety to life and property be further delayed, and the launch was let go from the ways. Very shortly afterwards it appeared that the *Gladstone* had been brought up by her chain, and that the launch was moving in the direction of the *Gladstone*. The anchor of the launch was then let go immediately, the *Hercules* towed away at the *Gladstone*, and got her ahead of her anchor, and the *Gladstone* was hailed to pay out chain. Those on board the *Gladstone* neglected to pay out chain, and the anchor of the launch dragged, and she with her stern struck the port side of the *Gladstone* about the main rigging, and suffered considerable damage. This was about 10.30 A.M. The *Gladstone* unfortunately sank in a few minutes.

6. Save, as aforesaid, the defendants deny the several allegations in pars. 1, 2, 3, 4, 5, 6, and 7 of the statement of claim. Those in pars. 8, 9, 10, 11, and 12 they deny altogether.

7. The date of the said launch had been fixed for several days and the defendants had given all the usual and necessary notices of the same. The launch and the *Hercules* and other vessels in attendance were dressed with flags. Those in charge of the *Gladstone* knew, or had full notice and means of knowing of the intended launch, and that it could not with safety be postponed, and had ample time to move her or cause or suffer her to be moved out of the way, but they neglected and refused to do so until it was too late.

8. Those on board the *Gladstone* improperly neglected to move her out of the way, and improperly refused and delayed to take the assistance offered by the *Hercules*.

9. Those on board the *Gladstone* neglected to get in chain on her anchor, so as to suffer her to drag her anchor, and when she was being towed, and it was too late to get in chain for this purpose, they neglected to pay out chain and to take any steps so as to enable the *Hercules* to tow her further ahead of her anchor and into a position of safety.

10. The collision was caused by some or all of the matters and things stated in the 7th, 8th, and 9th paragraphs hereof or otherwise by the negligence of the plaintiffs or of those on board the *Gladstone*.

11. The collision was not caused or contributed to by the defendants or by any of those on board the *Cachapool*.

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By way of counter-claim the defendants repeated the allegations made by them by way of defence, and alleged that they had sustained great damage by reason of the collision.

Nov. 4, 5. The action was heard before the judge assisted by two of the Elder Brethren of the Trinity House.

Witnesses were examined orally in Court on behalf of the plaintiffs and of the defendants. The pilot of the *Gladstone* was examined as a witness on behalf of the plaintiffs, and stated that he was a duly licensed Liverpool pilot, and took charge of the *Gladstone* in dock on the morning of the 8th of August, 1881, and brought her out into the river and anchored her nearly abreast of Tranmere Ferry stage by her port anchor and forty-five fathoms of chain: that all the crew of the *Gladstone* were on board her by 7 o'clock that evening, and it was intended that she should go to sea early the next morning, a tug having been ordered to come to her for the purpose of taking her in tow at 1 A.M.; but that at 8 P.M. of the 8th of August an accident happened to her mainyard arm, whereby it was so damaged that it would take two days to repair; that accordingly when the tug came to take the *Gladstone* to sea in the morning as ordered she was sent away, and the vessel remained at anchor.

The same witness further stated that the weather on the morning of the 9th of August would not have permitted the *Gladstone* going to sea, even if there had been no accident to her yard-arm; that he had had no notice that any launch was going to take place until he saw the *Cachapool* decorated with flags after 6 A.M. on that day; and that he was in charge of the *Gladstone* at the time of the collision, and that all the orders he gave had been properly obeyed. The result of the remainder of the evidence in the case is stated in the judgment.

Butt, Q.C., and *Myburgh*, for the plaintiffs. Even admitting that sufficient previous notice was given that the *Cachapool* was going to be launched yet the defendants are still to blame in this case. Sufficient precautions were not taken to check and guide the

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Cachapool after she had left the ways. Moreover she was launched at a time when it was known that the *Gladstone* was in her track. The *Gladstone* would have been towed clear in a very few minutes, and even if the launch could not have been stopped after the dog shores were knocked away, those in charge of the launching operations ought not, whilst the *Gladstone* remained in the way, to have proceeded so far with them as to put it out of their power to prevent the collision. [They referred to *Davies v. Mann*. (1)]

If the Court should be of opinion on the evidence that the *Gladstone* was "proceeding to sea" at the time when the collision occurred, then the pilot on board her was employed by the plaintiffs by compulsion of law: The Mersey Docks Consolidation Act, 1858, s. 139, *The City of Cambridge* (2); and the plaintiffs even if the *Gladstone* should be found to blame, are not liable for the damage proceeded for.

Cohen, Q.C., and *W. G. F. Phillimore*, for the defendants. The pilot and master of the *Gladstone*, had ample notice of the launch being about to take place, and it was their duty to have taken all possible measures to have had the *Gladstone* towed clear of the track of the launch. This duty they neglected to perform, and it was solely by their default in this respect that the collision was occasioned. Those in charge of the launch had a right to assume that the *Gladstone* would not remain in the way of the launch, and when it was found that this assumption was a mistake it was too late to stop the launch without great danger, even if it had been possible to do so. With respect to the plea of compulsory pilotage it is clear on the authority of *Rodrigues v. Melhuish* (3) that as the *Gladstone* at the time of the collision was not ready to go to sea, owing to the damage done to her main yard on the previous evening, her pilot was not in charge of her by compulsion of law when the collision occurred.

Myburgh, in reply.

SIR ROBERT PHILLIMORE. This is a case of collision which happened in the river Mersey at about twenty-five minutes past ten o'clock on the morning of the 9th of August last about

(1) 10 M. & W. 546.

(2) Law Rep. 4 A. & E. 161; 5 P. C. 451.

(3) 10 Ex. 110.

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abreast of the Tranmere Ferry. The vessels that came into collision were the barque *Gladstone* and a vessel which was being launched from a building yard on the Cheshire side of the river. The *Gladstone* was lying at anchor with her head down the river, and was about abreast of the Tranmere Ferry stage. The launch was a vessel named the *Cachapool*, and with her sternpost she struck the port side of the *Gladstone* near the main rigging, and the *Gladstone* was sunk almost immediately after the collision. The law with respect to the notice that must be given by vessels about to be launched has been several times discussed in this Court, and for the purpose of stating what that law is, I will only refer to the case of *The Glengarry*. (1) In that case, in which I gave judgment, I said: "There is no doubt whatever as to the law which has been laid down for a considerable period and always observed in this Court, namely, that it is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening from that event, and that the burden of proof lies on them. There is no doubt at all that those who defend the cause of the launch have the obligation cast upon them of shewing that it took place in such circumstances as ought with reasonable precautions on the other side not to have brought her into collision. What is reasonable notice must of course depend very much on the facts of each case. To the propositions of law so laid down I intend to adhere in the judgment I am about to deliver. The dates in this case are not immaterial. It is pleaded in the 3rd article of the statement of claim "that the weather was fine and clear at about 10 o'clock, and that the *Gladstone* was then lying at anchor." That is a mis-statement of nearly an hour and a quarter, and the time becomes very material in the history of this case." It appears that flags were up at 6 o'clock in the morning, and that the *Cachapool* was ready to be launched at 9 o'clock; and it is alleged, and has been admitted, that notice was given at 7 A.M., the collision not taking place until 10.30 A.M. The question here is not whether the notice was sufficient, which it is admitted to have been, but whether there was any misconduct on the part of the launch,

(1) 2 P. D. 235.

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or whether the *Gladstone* was to blame. The Elder Brethren say, and I agree with them, that the conduct of the pilot of the *Gladstone* appears to have been reprehensible. He appears to have been quite indifferent as to what was taking place on the shore. On his own shewing he came on deck at 9 o'clock, and it was his duty to have got clear and to have been towed over to the north-east, and if necessary to have let his starboard anchor go. The Elder Brethren are of opinion, and I concur with them, that the launch was delayed as long as it was prudent to do so. It has been contended that it was the duty of the owners of the *Cachapool* to have taken such precautionary measures as would have prevented a collision. The launch being about to take place at about high water, which on that day was at ten minutes past 10 o'clock, it appears to us that every reasonable precaution was taken by those in charge of the *Cachapool*, not only by the decoration of that vessel, but by sending notice to all steamers and vessels in the river near the spot that a launch was going to take place. According to the evidence the *Hercules* tug came up between nine and five minutes past, and warned the *Gladstone* to get out of the way of the launch, which was about to take place. The plaintiffs contend that no offer was made as to the *Gladstone* being towed away by the *Hercules*, and it is admitted that no such offer was then made. The *Hercules*, however, went away to look after some other vessels, and returned in about five minutes, and after her return she offered to take the *Gladstone* in tow. It appears upon the evidence that when the *Hercules* on her return would have taken a hawser the pilot of the *Gladstone* said, "I will not give it you, but the captain may if he likes." In the end, from fifteen to twenty minutes was wasted in arguing about the question of towing the *Gladstone* out of the way. A question which has been much considered by the Court is whether, even after the *Gladstone* was taken hold of by the tug at half-past nine or a quarter to 10 o'clock, those on board the *Gladstone* did anything which contributed to the collision, or neglected to do anything which would have prevented it. The Elder Brethren are of opinion that if the *Hercules* in the first instance, instead of giving the warnings she did, had taken the *Gladstone* in tow, the result would have been different, and also that if those in

charge of the *Gladstone* had not been obstinate and had allowed the *Hercules* to take their vessel to the north-east the launch would have gone clear.

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In these circumstances the Elder Brethren are of opinion, and I agree with them, that the *Gladstone* was alone to blame for the collision. With regard to the plea of compulsory pilotage I am of opinion that the *Gladstone* was not a vessel "proceeding to sea;" that she did not come within the operation of the compulsory clause of the Act which has been referred to, and that her owners are not relieved from liability upon that ground.

Solicitors for plaintiffs: *Cooper & Co.*

Solicitors for defendants: *Toller & Sons.*

G. B.

ROSE v. ROSE.

May 11.

Cruelty—Condonation by Deed—Revival.

A husband had been guilty of cruelty and the wife had stipulated in a deed of separation not to take any proceedings against him in respect of that cruelty. He subsequently committed adultery:—

Held, following the case of *Gandy v. Gandy* (ante, p. 168) that the subsequent adultery did not revive the wife's right to complain of the cruelty.

Approved in affl 8PD 40 CA
THIS was a petition for dissolution of marriage by reason of the husband's cruelty and adultery. The husband had been guilty of cruelty, and the parties separated and lived apart under the provisions of a deed, the last clause of which was as follows:—

"No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents, and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or

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misconduct shall be pleaded or alleged by either party or be admissible in evidence."

The wife filed a petition in which she alleged adultery and cruelty committed both before and after the execution of the deed. The husband, amongst other things, denied the charge of cruelty since the deed, and alleged that the petitioner had by the deed condoned all the previous acts.

At the hearing the adultery was admitted, and the Court found that the respondent had not been guilty of cruelty since the execution of the deed.

Dr. Tristram, Q.C., and J. Thompson, for the petitioner.

E. Willis, for the respondent.

THE PRESIDENT. I was of opinion in *Gandy v. Gandy* (1), having regard to the practice of this Court, that adultery committed by a husband after the execution of a deed of separation revived the wife's rights and relieved her from the restraining covenants of the deed, but the Court of Appeal arrived at a different conclusion. (2) In that case the restraining covenant was not to sue for alimony; but I do not see any distinction between that and a covenant not to sue in respect of offences committed before the date of the deed. The Court of Appeal held that the contract made by the deed of separation cannot be affected by the subsequent adultery of the husband. This Court is bound by that decision, and I am therefore unable to pronounce a decree nisi for the dissolution of the marriage in the present case. The adultery of the husband, however, having been proved, I pronounce a decree for judicial separation with costs.

Solicitors for petitioner: *Hicklin & Washington.*

Solicitor for respondent: *W. Doveton Smythe.*

(1) Ante, p. 77.

(2) Ante, p. 168.

SMITH v. SMITH AND PALK.

1882

*Costs, Security for.**June 6.*

In a petition for dissolution of marriage, the husband, who was an uncertificated bankrupt, claimed damages. Upon application by the co-respondent:—

Held, that unless the claim for damages was withdrawn the petitioner must give security for the costs of the action.

THIS was a summons for security for costs.

The petitioner had filed a petition for dissolution of marriage by reason of his wife's adultery with the co-respondent, and he also claimed 2000*l.* as damages. The co-respondent filed an answer denying the charges and alleging counter-charges, and also (amongst other things), that the respondent was, to the knowledge of the petitioner, living a life of prostitution, and that he had received from her moneys that he knew had been obtained by her prostitution.

The co-respondent now filed affidavits shewing that the petitioner was an uncertificated bankrupt.

Searle, for the co-respondent, applied for security for costs and a stay of proceedings until the security had been given. The proceedings, so far as damages are claimed, are in the nature of an action for crim. con. to which the practice at common law is applicable.

THE COURT granted the application, unless the petitioner within a week withdrew the claim for damages.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitor for co-respondent: *J. C. Stogdon.*

W. P.

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WIGNEY v. WIGNEY.

June 6.

Variation of Settlements—Lis pendens—Rights of Third Parties—Charge for Solicitor's Costs.

Upon a petition for variation of settlements, the Court has power to make an order in favour of the interests of third parties created before the filing of that petition.

Until a decree has been made for dissolution of a marriage, there is no *lis pendens* with reference to the property included in the marriage settlements.

Before a decree *nisi* was made for dissolution of the marriage, the respondent had charged his interest under the marriage settlement with payment of his solicitor's costs of suit :—

Held, that, under the circumstances, the charge was valid and that the respondent's interests could not be extinguished without providing for this charge.

THIS was a petition for variation of settlements, and involved a question as to the validity of a charge affecting a respondent's interests and made before the decree *nisi* in the action.

The parties were married on the 16th of December, 1863. The husband, had at the time of the marriage, an appointment in the Indian Staff Corps, which he then resigned, and retired upon half-pay amounting to 120*l.* a year. This remained his sole income. The wife was possessed of 40,000*l.*, which was settled as follows: The income of 15,000*l.* amounting to 948*l.*, was given to the respondent for life, and the income of 25,000*l.*, amounting to 1165*l.* to the petitioner for life. The wife had, in the event which had happened, of no issue, the right to appoint the whole fund absolutely; but there was an absolute right in the fund to the husband in default of her appointment. The husband had borrowed the sum of 4200*l.* on mortgage of his life interest under the settlement and of certain policies of assurance upon his life. The interest on the mortgage amounted to 210*l.* a year, and the premiums on the policies to 120*l.* a year. The whole of the 4200*l.* had been spent by the husband upon their joint establishment.

The wife subsequently petitioned for a dissolution of marriage by reason of her husband's cruelty and adultery. The petition came on for hearing on the 2nd of July, 1880, and on that day and before the action was heard, the respondent had charged his interest under the settlements with payment of his costs of the

action. The Court made a decree nisi on the 2nd of July, which was made absolute on the 11th of January, 1881.

The petitioner petitioned for a variation of the settlements by extinguishing the respondent's interests as if he were then dead, and the Court made an order accordingly, but without prejudice to the rights of the mortgagees, and this order was confirmed upon appeal, ante, p. 177.

At the time when this order was made, the question now for consideration, viz. as to the charge in favour of the solicitors, was reserved by consent.

Inderwick, Q.C., and *Middleton*, for the petitioner. The solicitors are not entitled to the benefit of this charge. At the time when they took it they were aware that the respondent's interests in the settlement would be extinguished and therefore had notice of the petitioner's rights. Those rights were then in existence, for there was a *lis pendens* as to them, and if so they would be affected by it: *Sugden on Vendors* (ed. 1862), p. 758; *Bellamy v. Sabine*. (1) This is the proper tribunal to decide the question. The Judicature Act, 1873, s. 24, sub-ss. 4 and 7, and the interpretation clause. (2) This is an equitable right (if any), which a Court of the Chancery Division would have recognized if the suit had been instituted there, and, if so, this Court is bound to consider such equitable claim.

Farwell, for the solicitors. The Court's jurisdiction in this matter is restricted to an order for the benefit of the children

(1) 1 De G. & J. 566, *3 Feb 1854* or on such reasonable terms and conditions as to them shall seem just, all

(2) Sub-section 4: The said Courts respectively . . . shall recognize and take notice of all equitable . . . rights . . . appearing incidentally in the course of any cause or matter in the same manner in which the Court of Chancery would have recognised and taken notice of the same . . . before the passing of this Act.

such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that as far as possible, all matters so in controversy between the said parties respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

Sub-sect. 7: The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely

Interpretation clause: Matter shall include every proceeding in the court, not in a cause.

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and parents, 22 & 23 Vict. c. 61, s. 5 (1), and cannot interfere with any other charge. The charge does not arise until after the decree absolute, and the order cannot be retrospective so as to regard things previously done: *Paul v. Paul & Farquhar*. (2) A prisoner may before conviction make a valid assignment of any of his property: *Perkins v. Bradley* (3); *Chowne v. Baylis*. (4) The *lis pendens* only referred to the principal matter of the suit, viz., the right to a dissolution of the marriage. It cannot affect the rights of third parties, or at all events, rights acquired prior to the decree.

Cur. adv. vult.

June 6. THE PRESIDENT. The decree nisi pronounced on the 2nd of July, 1880, for the dissolution of the marriage of these parties by reason of the cruelty and adultery of the respondent was made absolute on the 11th of July, 1881. On the 2nd of February Mrs. Wigney filed a petition for the variation of the settlement made on her marriage.

By that settlement (of the 18th of September, 1863) the petitioner's fortune was settled as to certain property, the income of which amounted to 948*l.* 7*s.* 2*d.* to pay upon trust the same to the respondent and his assignees during his life, and after his death to pay the same to the petitioner for her life, and as to certain other property, the income of which amounted to 1165*l.* 2*s.* 5*d.* to pay the same to the petitioner for life, and on her death to the respondent and his assigns for life, and after the death of the survivor as to both funds in trust for the children of the marriage, and if none, in trust as the petitioner should by will appoint, and in default of appointment for the respondent absolutely.

The respondent, who brought no property into settlement and is possessed of no income, beyond a pension of 120*l.* as a retired captain in the army, borrowed 4200*l.* on the security of his life interest. On the day on which the decree nisi was pronounced, but before it was pronounced, the respondent executed a further mortgage of his life interest to his solicitors, Messrs. Saunders & Stokes, for 215*l.* and such further sum as they might become entitled to have in respect of the divorce suit.

On the hearing of the petition for variation of the settlements I

(1) See post, p. 231.

(2) Law Rep. 2 P. & D. 96.

(3) 1 Hare, 219.

(4) 31 Beav. 351. *8 June 85*
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directed that the interest of the respondent in the settled property should be extinguished, but without prejudice to the mortgagees for 4200%. The question of the rights of the respondent's solicitors under their mortgage was not then before me, but was reserved at the instance of the parties. I have now been called upon by the petitioner to declare that the derivative interest, if any, of Messrs. Saunders & Stokes in the property settled is determined by the extinguishment of the respondent's interest.

The authority under which the Court is called upon to act is conferred by the 5th section of 22 & 23 Vict. c. 61, by which it is enacted "that the Court after a final decree of nullity or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such order with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as the Court shall deem fit." I think that under this enactment the Court has the power to make an order which may affect the interests of third parties created before the institution of proceedings for variation of the settlement. For example, I have in a case, which I believe is not reported, made an order in favour of a husband, although it prejudiced the rights acquired by a co-respondent by his marriage with the guilty wife, and other cases of a like kind may be imagined, but as a rule it appears to me that the Court is bound to respect the rights of mortgagees created before the petition for variation of the settlements is presented, and I acted on this principle in the present case. The Court of Appeal went even further, and ordered that the wife should pay unsecured debts which have been incurred by the husband in keeping up the household while the parties lived together, a question which had not been raised before me.

I have then to consider whether I ought to deprive Messrs. Saunders & Stokes of the security for their costs, which they obtained from the respondent on the day the decree nisi was pronounced. I am asked to declare that the interests of these gentlemen is already determined by the order extinguishing the husband's interest, but it is clear that I cannot do this because this question was expressly reserved, and it must be decided upon

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the merits as though they had been investigated at the time of the original hearing of the petition for variation of the settlements.

It was urged on behalf of the petitioner that there was at the time of the creation of this charge a *lis pendens* with reference to the settlements, of which the solicitors of the respondent had express notice, but I think that this argument fails as there was not and could not be any *lis pendens* as to the settlements until the dissolution of the marriage.

The question must therefore be considered upon such general principles as may appear applicable to this peculiar power with which the Court is invested. All the circumstances must be taken into account. If the life interest of the respondent had extended to the whole income derived from the wife's property, and he had attempted to deprive her of all benefit from that property during his life, I should have thought myself justified in preferring the interest of the wife, at least to some extent, to that of the husband's creditors, but here the petitioner is in possession of a considerable income altogether independent of her husband. The husband had no means of his own with which to pay his solicitor's costs. The case therefore bears some analogy to that of a wife who is without the means of defending herself in a suit for dissolution of her marriage to this extent at least, that I do not think I ought to deprive the solicitors who have not been guilty of misconduct of a security for their reasonable costs given by the husband in the exercise of the legal right of which he was possessed at the time. The charge of cruelty on which the petitioner's success in the suit depended was not one to which the solicitors could see there could be no defence.

I think, therefore, that in taking the security offered them by their client the solicitors cannot be deemed to have done anything inequitable towards the petitioner, although it is possible that they may have anticipated that her interests would be effected by the security they acquired.

I therefore refuse the application.

Solicitors for petitioner: *Ayrton & Biscoe.*

Solicitors for mortgagees: *Stokes, Saunders & Stokes.*

MASON v. MASON AND McCLUNE.

1882

Dissolution of Marriage—Unreasonable Delay.

July 18.

A husband in 1878 obtained a judicial separation and 50% damages by reason of his wife's adultery. The wife continued to cohabit with the adulterer, and the husband in 1882 petitioned for a dissolution of his marriage:—

Held, that he had been guilty of unreasonable delay. Petition dismissed.

THIS was a petition for dissolution of marriage by reason of the adultery of the respondent and co-respondent.

The petitioner and respondent were married in 1871, and in 1875 the respondent committed adultery with the co-respondent, who was in partnership with the petitioner as a baker. This the petitioner forgave, but they again committed adultery, and in 1878 the husband filed a petition for dissolution of marriage and claimed damages. 50% were awarded as damages, but the petitioner at that time asked only for a judicial separation, which was accordingly decreed. The respondent and co-respondent continued to live together, and the petitioner now filed another petition, asking for a dissolution of his marriage by reason of the adultery committed since the last suit. The petitioner explained that he had not asked for a dissolution of his marriage in the previous action, because he then hoped that his wife would return to live with him. It also appeared that if he had made inquiries at any time after the first suit he might have ascertained that his wife was cohabiting with the co-respondent.

C. A. Middleton appeared for the plaintiff.

THE PRESIDENT. The facts of the case raise a novel question, but the objection that has occurred to my mind has not been displaced. The petitioner in 1878 asked for a decree of judicial separation instead of that to which he would have been entitled, viz., a decree for dissolution of his marriage, and now in 1882, having taken no steps in the meantime with a view to induce his wife to break off her connection with the co-respondent, he asks for a decree nisi. He gives as his reason for not having before sought for such decree that he had hopes of inducing his wife to

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come back to him. I cannot regard his reason as one which is to extend for an indefinite time, until he should alter his mind, and having regard to the fact that this is the only ground on which he seeks to excuse his delay, I must dismiss his petition, as in my judgment the circumstances of the case shew him to have been guilty of unreasonable delay.

Petition dismissed.

Solicitors for petitioner: *Gregory, Rowcliffes, & Co., agents for G. E. Pickering, Leeds.*

W. P.

May 23.

PERCIVAL v. CROSS AND OTHERS.

Probate—Infants—Guardian ad litem.

When a will is disputed by a guardian ad litem on behalf of infants, the Court of Probate has power to inquire whether the suit is for their benefit.

THIS was an action for probate of the will, dated the 18th of June, 1880, of Walter Percival, late of Mile End New Town, horsehair manufacturer, deceased.

The deceased left him surviving his widow and three children, two of whom were minors and one an infant; and by the will in question he had given certain legacies to his widow and children, and directed that his business should be carried on for their benefit. Joseph Percival, a paternal uncle, had obtained an appointment of himself as guardian ad litem of the infants, and as such had denied the validity of the will, and propounded an earlier will, which, amongst other things, directed that the business should be sold immediately after the death of the testator.

Bayford, for Matilda Percival, the mother, who had obtained an order adding her as a defendant, moved to supersede the order appointing a guardian. The affidavits shew that the uncle is not a proper person to be appointed guardian, and that the suit is not for the benefit of the infants. He cited Daniell's Chancery Practice, vol. i. p. 69.

Searle, for defendants, the executors of the later will.

Fillan, for plaintiff.

THE PRESIDENT ordered that it be referred to one of the registrars to report whether the action is for the benefit of the infants, and if so to appoint another guardian ad litem. :

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Solicitors for plaintiffs: *Hatchett, Jones, & Letcher.*

Solicitors for defendants, the executors: *T. Beard & Son.*

Solicitor for Matilda Percival; *W. Playters Moore.*

W. P.

CARPENTER v. SOLICITOR TO THE TREASURY, SUEB AS QUEEN'S
PROCTOR.

 July 18.

Probate Action—Administrator pending Suit—Surety—Guarantee Society.

The "Guarantee Society" may be accepted as surety to a bond given by an administrator pending suit, even though the directors do not by the bond render themselves personally liable.

THIS was an action to establish the will, dated the 31st of May, 1881, of John Allen Stokes, late of 24, Hopton Road, Surrey, deceased. The personal property amounted to about 12,000*l.*

Mr. Edward Stimson had been appointed administrator pending suit, and he had named the "Guarantee Society" as his surety.

This society is constituted under an Act of Parliament (5 Vict. c. lxiv.) and has a capital of 124,000*l.* and upwards, which is liable to make good all claims in respect of the society's bonds. By s. 16 of the Act the Lords of the Treasury, or principal officers of any public body, are empowered to accept the security of the society. The 16th clause of the deed of settlement is to the following effect :

"Provided always, and it is hereby agreed that this bond is entered into by the said society on the condition that the capital, stock, and funds, according to the deed of settlement of the said society shall alone be liable to answer and make good all claims in respect of this bond, and that no director or proprietor of the said society shall in any manner be personally liable, or subject to any claims or demands by reason of such bond, beyond the amount remaining to be called up of his or her share or shares of such capital, stock, or funds."

The society had, since the year 1876, been in the habit of

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giving bonds to the Probate Court, but in this case, the registrar objected, on the ground that the directors who signed the bond did not by reason of the clause above-mentioned, render themselves personally liable.

A. L. Smith, for the defendant, moved the Court to accept the usual bond of the society : *Colmore v. North*. (1)

Searle, for the plaintiff, did not oppose.

THE PRESIDENT. The bond proposed is in accordance with the rules prescribed by the constitution of the society, and the only question is whether in the exercise of my discretion I ought to order that it be accepted. I think I ought to do so as the security is unquestionably better than that offered by a private person.

Order accordingly.

Solicitors for plaintiff : *Fox & Page*.

Solicitors for defendant : *Hare & Co.*, agents for the Solicitor to the Treasury.

(1) 42 L. J. (Ch.) 4 ; 27 L. T. (N.S.) 405 ; 21 W. R. 43.

BRADLEY v. BRADLEY.

Dissolution of Marriage—Maintenance—Dum Casta Clause.

1882

June 6.

A deed had been executed securing a maintenance for the wife after the decree absolute. The deed did not contain a dum casta clause:—

Held, that the Court had no power to set aside the deed by reason that the wife was no longer chaste.

THIS was a motion that a deed providing an annuity to the petitioner on the dissolution of her marriage might be cancelled, by reason that since the execution of the deed she had ceased to be chaste.

On the 30th of November, 1877, the petitioner (the wife) had obtained a decree absolute for dissolution of her marriage, and by order of the Court a deed was, on the 29th of July, 1878, executed between the parties and a trustee, whereby the respondent secured to the petitioner an annuity of 100*l*. The deed had been settled by one of the conveyancing counsel of the Chancery Division, and did not contain the dum casta clause.

April 20. *Dr. Tristram, Q.C.*, for the respondent, moved that the deed be delivered up to be cancelled. The affidavits shew that the petitioner has been unchaste, and it was never intended that the respondent should be bound to contribute to her support after she ceased to be chaste: *Fisher v. Fisher* (1); *Chetwynd v. Chetwynd*. (2)

Dr. Swabey, contra. The charge of unchastity is denied, but it is not necessary to consider this as the Court has no power in the matter. This is not an application to vary an order of the Court, but to set aside a deed: *Narracott v. Narracott and Heskett* (3); *Gladstone v. Gladstone*. (4)

Dr. Tristram, in reply.

Cur. adv. vult.

JUNE 6. SIR J. HANNEN (The President). The marriage between the parties was dissolved on the 20th of November, 1877, on the ground of the husband's cruelty and adultery. The respondent

(1) 2 S. & T. 410.

(3) 4 S. & T. 76.

(2) Law Rep. 1 P. & D. 39.

(4) 1 P. D. 442.

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was afterwards ordered to secure to the petitioner 100*l.* a year for permanent maintenance; and it was referred to one of the conveyancing counsel of the Court of Chancery to settle and approve a proper deed for the purpose. The deed prepared by counsel did not contain a clause that the provision should be payable only so long as the wife should remain chaste, and I refused to order that such a clause should be inserted. The deed was executed on the 29th of July, 1878. It is now asserted that the petitioner has since the execution of the deed led an immoral life, and I am asked on that ground to cancel the deed.

It was objected on behalf of the petitioner, without admitting the charge of unchastity, that I have not the power to cancel the deed, and I am of opinion that this contention is well founded. The deed was settled in accordance with what I believe to be the practice of conveyancing counsel in such cases, and if I was wrong in refusing to order a *dum casta* clause to be inserted in the deed, that should have been made the subject of appeal at the time. But the deed once executed, in the absence of fraud, it became binding according to its terms. I should add that if any ground for setting aside the deed, on the ground that it did not express the intention of the parties, had been established this would fall within the description of business assigned to the Chancery, and excluded from the jurisdiction of this, Division.

The application must be rejected, with costs.

Solicitors for petitioner : *Shaen, Roscoe, & Massey.*

Solicitors for respondent : *Nash & Field.*

R. A. P.

HOCKLEY AND OTHERS v. WYATT.

1882

July 27.

Will—Proof in solemn Form—Rule 41—Costs—Residuary Legatee under prior Will.

The rule and practice by which a party may compel proof of a will in solemn form, without liability for costs, do not extend to a residuary legatee under a prior will.

THIS was an action propounding the will, dated the 24th of December, 1881, of Jane Platt Walton, who died on the 28th of December following.

The plaintiffs were the executors, and probate was opposed by the defendant, who was one of the residuary legatees of a prior will of the deceased. The defendant denied the due execution of the will, and the capacity of the deceased at the time, and alleged that the deceased did not know and approve of the contents of the will, and with his statement of defence he also delivered a notice under Rule 41 of the Rules and Orders of the 20th of July, 1862. (1)

At the hearing the Court pronounced for the will.

J. G. Witt, for the plaintiffs. The defendant ought to be condemned in costs. The notice is no protection to a legatee under a former will. The practice of the Prerogative Court, to allow a party to put the other side upon proof of a will in solemn form without liability for costs, never extended beyond a next of kin or an executor of a former will who had already proved that will: *Boston v. Fox* (2); *Leeman v. George & Rosser* (3); *Williams on Executors*, 8th ed. p. 344.

Bayford, for the defendant. The practice does extend to a residuary legatee, but if it does not the circumstances of this

(1) In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to

do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court. 1

(2) 29 L. J. (P. & M.) 68.

(3) Law Rep. 1 P. & D. 542.

1882 case are such that the Court ought not to condemn the defendant
HOCKLEY in costs.

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THE PRESIDENT. This question has been before me on previous occasions, but has not yet been the subject of judicial decision. I have now had my attention directed to the authorities, and it seems to me that, according to the practice of the Prerogative Court by which I am bound, the privilege of putting an executor to proof in solemn form without liability to costs was not extended to a legatee under a previous will. I therefore hold that the notice given by the defendant affords him no protection.

His Lordship thereupon reviewed the facts of the case, and came to the conclusion that each party should pay his own costs.

Solicitors for plaintiffs: *Sharland & Hatton*.

Solicitor for defendant: *T. Sismey, for A. Tollhurst, Gravesend*.

R. A. P.

April 25.

THE VESTA. (1881. C. No. 6064. Fol. 12.)

Damage — Compulsory Pilotage — London Trinity House District — Foreign Vessels carrying Passengers from London to Hamburg — Pilotage Act, 1825 (6 Geo. 4, c. 125), s. 59 — Pilotage Amendment Act, 1853 (16 & 17 Vict. c. 129), s. 21 — Order in Council, February 18th, 1854 — Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 353, 370, 376, 388 — Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), s. 10.

Sections 353 and 376 of the Merchant Shipping Act, 1854, render foreign vessels trading with cargo and passengers from the port of London to ports between Boulogne and the Baltic subject to compulsory pilotage on their outward passages between London and Gravesend, unless their masters or mates have pilotage certificates from the London Trinity House; and the operation of these sections, so far as such vessels are concerned, is not affected either by the Order in Council of February 18th, 1854, or by the provisions contained in the Harbours and Passing Tolls Act, 1861.

The Hanna (Law Rep. 1 A. & E. 283) followed.

THIS was an action of damage instituted on behalf of the owner, master, and mate of the sailing barge *Audacious* against the German steamship *Vesta*.

The plaintiffs, in their statement of claim, after alleging that on the 27th of September, 1881, the *Vesta* coming down the

Thames under steam had run into and damaged the *Audacious*, and attributing blame for the collision to those on board the *Vesta*, claimed judgment against the defendants, the owners of the *Vesta*.

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THE VESTA.

The defendants delivered a statement of defence, of which the 1st, 2nd, and 3rd, paragraphs were, so far as material, as follows:—

1. The *Vesta*, a German screw steamship, 623 tons register, of which the defendants are the owners, left Horselydown, in the river Thames, shortly after noon on the 27th of September, 1881, manned by a crew of twenty-three hands and a pilot, and a general cargo and passengers, bound to Hamburg.

2. About 1.30 P.M. of the same day, the *Vesta*, on her way down the river, was in the lower part of Blackwall Reach, a little to the south of midstream, heading straight down the reach, and making from three to four knots an hour through the water under steam alone.

3. About the same time the *Audacious* was observed half a mile ahead of and a little on the starboard bow of the *Vesta*, sailing up the river with her sails full. When the *Audacious* was close to the *Vesta* she headed across the course of the *Vesta* apparently under a port helm, and caused imminent danger of collision. The engines of the *Vesta* were at once put full speed astern and her helm put hard a-starboard, but the *Audacious* coming up with the tide came into collision with the *Vesta*.

After the pleadings had been concluded, but before the action was heard on the merits, an order by consent was made in the registry that the question of law should be first argued, whether, assuming the allegations in paragraphs 1, 2, and 3 of the statement of defence to be true, pilotage was compulsory by law upon the *Vesta*.

April 18th. The question of compulsory pilotage was argued.

It did not appear by what channel of the Thames the *Vesta* had come up on the voyage previous to that on which the collision occurred, or by which channel she would have left the Thames if there had been no collision.

W. G. F. Phillimore and *Bucknill*, for the plaintiffs. Notwith-

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standing that the *Vesta* was carrying passengers she was exempt from being compelled to employ a licensed pilot. In the first place she was so exempt on the ground that she was a vessel trading from London to a port between Boulogne and the Baltic on her outward passage down the Thames, and, therefore, a vessel coming within the exemptions from compulsory pilotage created by an Order of Council of the 18th of February, 1854 (1), and still in force by virtue of the 353rd section of the Merchant Shipping Act, 1854. The exemptions in this Order in Council relating to vessels navigating the Thames apply to foreign vessels, for they purport to apply to "ships or vessels," and were made under the powers conferred by the 21st section of the Pilotage Amendment Act, 1853, and that section uses the words "ships or vessels" as clearly including foreign vessels. Secondly, even if this Order in Council only applies to British vessels, the *Vesta* was still exempt from compulsory pilotage by force of the 10th section of the Harbours and Passing Tolls Act, 1861. The contention that that section does not relieve foreign vessels in certain cases from being compelled to employ pilots, is supported by the language of the 2nd section of the same Act, and s. 4 of 59 Geo. 3, c. 54.

Butt, Q.C., and *Stubbs*, for the defendants. Under the 376th section of the Merchant Shipping Act, 1854, read with the 370th section of the same Act, the master of the *Vesta* was bound to employ a Trinity House pilot on his passage down the Thames, for the Order in Council of the 18th of February, 1854, must, so far as it relates to exempt ships, be construed as merely supplemental and subsidiary to the provisions of the 59th section of the General Pilotage Act of 1825, and, therefore, as confined to vessels having a British register. To hold otherwise would be to exempt from the obligation to employ a pilot on her passage down the Thames by the North Channel a foreign vessel which would be compelled to take a pilot on her passage up the same channel. The Harbours and Passing Tolls Act, 1861, has not relieved the masters of foreign vessels from any obligation then existing on them to employ pilots. On this point the reasoning of Dr. Lushington in the case of *The Hanna* (2), where the Court held

(1) Maude and Pollock, 4th ed. vol. 24th of February, 1854.
ii, Orders in Council, p. 68. Gazetted (2) Law Rep. 1 A. & E. 283.

that compulsory pilotage was to be considered not as a charge upon vessels but as a regulation for their benefit, is strictly applicable to the present case.

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[They also referred to the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 141.]

Phillimore, in reply.

Cur. adv. vult.

April 25. SIR ROBERT PHILLIMORE. This was a case of collision between the sailing barge *Audacious* and the screw steamship *Vesta*, which took place last September in the lower part of Blackwall Reach in the river Thames. The defendants' ship the *Vesta* was a German vessel, not having a British register; she had on board passengers and cargo and was bound from London to Hamburgh. It was admitted at the trial, for the purposes of the argument, that the collision was due to the fault of the pilot on board the *Vesta*, and the only question for decision at present is whether or not the pilot was taken on board by compulsion of law. The plaintiffs contended that there was no such compulsion, and founded their argument on two grounds.

First, that previously to the passing of the Merchant Shipping Act, 1854, the *Vesta* would have been exempt under 6 Geo. 4, c. 125, s. 59, taken together with an Order in Council of February, 1854, it being admitted that s. 353 of the Merchant Shipping Act, 1854, preserved all such exemptions from compulsory pilotage as existed at the date of the coming into operation of the latter Act. (1)

Secondly, that pilotage dues or rates are dues within the meaning of the Harbour and Passing Tolls Act, 1861, which Act abolishes all differential dues, and that to impose pilotage on foreign vessels where it is not imposed on British vessels would be to impose a differential due.

I will deal first with the contention of the plaintiffs founded upon the Act of Geo. 4 and the Order in Council of February, 1854. The 6 Geo 4, c. 125, s. 59, provides that "the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat, or Baltic, or round the North Cape, or into the White

(1) 1st of May, 1855.

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Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel but not otherwise)"—whatever that may mean—"shall and may lawfully," and without being subject to any of the penalties imposed by that Act, "conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel." The clumsy and careless language of this section leaves two important omissions, viz., no provision is made, first, for vessels trading *outwards* to the ports between Boulogne and the Baltic; secondly, for vessels coming inwards by the south channels; the north being the only channel mentioned. The regulations for the extension of the then existing exemptions from compulsory pilotage annexed to and approved of by the Order in Council of the 18th of February, 1854, are headed: "Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the Act 6 Geo. 4, c. 125, submitted by the Corporation of Trinity House for the consideration of Her Majesty in Council, pursuant to the provision of the 21st section of the Act 16 & 17 Vict. c. 129," and provide that, subject to the provisions contained in the 59th section of 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, exemption from compulsory pilotage shall be allowed to the masters

"Of ships and vessels trading to Norway, or to the Catte-gat, or Baltic, or round the North Cape, or into the White Sea when coming up by the South Channels:

"Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the South Channels:

"Of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits nor anchoring therein."

The plaintiffs contended that the words "ships and vessels"

mean all ships and vessels foreign as well as British. It is somewhat strange that no judicial decision as to the meaning of these words should have been given, but such I am informed and believe is the case. If the plaintiffs' construction be right the Order in Council, which was evidently intended to remedy a defect, would have introduced a new one, inasmuch as if the exemptions in the Order in Council do apply to vessels not having a British register, the Court would be bound to hold that a foreign vessel trading to ports between Boulogne and the Baltic is not under its provisions exempted from compulsory pilotage on her inward passage if she comes up the Thames by the North Channel; the exemptions in the Order in Council relating to traders to ports between Boulogne and the Baltic being expressly confined to vessels "on their outward passages and when coming up by the south channels;" and the exemption in the 59th section of 6 Geo. 4, c. 125, as to constant traders inwards from ports between Boulogne inclusive and the Baltic, expressly relating only to British ships. In other words, according to the construction put on the Order in Council by the plaintiffs, by the joint operation of the Order in Council and the 59th section of 6 Geo. 4, c. 125, a foreign ship to Hamburgh would be exempted from compulsory pilotage in the Thames on her outward passages, but would still be liable to compulsory pilotage on her inward passages when coming up by the North Channel. I am of opinion that this absurdity does not arise, and that the exceptions in this Order in Council do not apply to foreign vessels, but that the words "ships and vessels," when used in the portion of the Order in Council I have read, must mean British ships and vessels, which alone are dealt with by the material portions of the 59th section of 6 Geo. 4, c. 125, to which section the Order in Council in question, so far as it relates to exemptions, is subsidiary, and of which it is explanatory. I think moreover that this was the opinion to which Dr. Lushington inclined in the cases of *The Earl of Auckland* (1) and of *The Hanna*. (2)

I now come to the second point relied upon by the plaintiffs, namely, that all differential dues are abolished by the Harbours and Passing Tolls Act, 1861, and that a pilotage due imposed on

(1) Lush, 164.

(2) Law Rep 1 A. & E. 283.

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a foreign ship which is not imposed on a British ship would be a differential due and therefore has ceased to exist. The sections relied upon are the 2nd, 10th, and 11th of the Harbours and Passing Tolls Act, 1861. By the 2nd section the term "differential duties" is defined to include any dues, rates, or taxes levied on foreign ships, &c., which are not levied under like circumstances on British ships, and the plaintiffs contend that that term would include compulsory pilotage. To this argument I cannot accede. In the first place, the Act of 1861 clearly did not contemplate the subject of compulsory pilotage at all, and it would be a very forced construction of the statute to hold that any legislation on that subject was indirectly effected by it. In the next place, the subject seems already disposed of by Dr. Lushington's judgment in the case of *The Hanna* (1) already referred to. In that case reliance was placed on the expression contained in a convention of commerce between this country and Sweden. Dr. Lushington referring to 6 Geo. 4, c. 125, s. 59, as shewing that the exemptions under that section could not apply to a vessel not having a British register, said: "But the plaintiffs would escape from this difficulty by invoking a convention of commerce and navigation made between this country and Sweden in March, 1826, that is to say, a few months before the passing of 6 Geo. 4, c. 125. The 2nd section of the convention is as follows: 'British vessels entering or departing from the ports of the kingdoms of Sweden and Norway and Swedish and Norwegian vessels entering or departing from the ports of the United Kingdom of Great Britain and Ireland shall not be subject to any other or higher ship duties or charges than are or shall be levied on national vessels entering or departing from such ports respectively.' The plaintiffs contended that compulsory pilotage was a charge within the meaning of the above section of the convention, and, consequently, that notwithstanding anything in the 59th section of 6 Geo. 4, c. 125, Norwegian vessels could not be subjected to compulsory pilotage where British vessels were exempt. This view, however, seems to me untenable; the theory of the legislature whether right or wrong must be taken to be that compulsory pilotage is not a charge upon vessels, but rather a regula-

(1) Law Rep. 1 A. & E. 283.

tion instituted for their benefit." With this opinion I entirely agree. 1882

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I have considered the argument founded on 59 Geo. 3, c. 54. It seems to me not to affect the question of compulsory pilotage, though it may perhaps refer to pilotage dues where the legal necessity to take a pilot does not exist. Upon the whole, I am of opinion that the plaintiffs have failed to establish their position that the *Vesta* was not under compulsion of law to employ a pilot, and I must therefore order judgment to be entered for the defendants on the question of law.

Solicitors for plaintiffs: *J. A. & E. Farnfield.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

G. B.

THE RONA. (1881 G. No. 2117 Fo. 243.)

May 2.

County Court—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 Vict. c. 71), s. 3—*County Courts Admiralty Jurisdiction Act Amendment Act*, 1869 (32 & 33 Vict. c. 51), s. 2—*Jurisdiction*—"Claim in relation to the carriage of Goods in any Ship."

A Court having county court Admiralty jurisdiction under the County Courts Admiralty Acts, 1868 and 1869, has jurisdiction to try and determine an action at the suit of the holder of a bill of lading against a British ship to recover for a breach of the contract of carriage in the bill of lading, notwithstanding that it is shewn to the Court that at the time of the institution of the suit the owner of the ship proceeded against was domiciled in England or Wales.

The Cargo ex Argos (Law Rep. 5 P. C. 134) and *The Alina* (5 Ex. D. 227) followed.

THIS was an action commenced in the City of London Court (Admiralty Jurisdiction) by a summons the material part of which was as follows:—

"Whereas an action for damage to cargo has been instituted in this court on behalf of Messrs. Cole & Kirkman, of Liverpool, the legal holders of two bills of lading of cargo lately laden on board the ship *Rona*, against the owner or owners unknown of the said ship, now lying in the port of London, in the sum of 300*l.* and costs, you are hereby summoned to enter an appearance in the said action within four clear days of the service hereof."

An appearance having been entered for the owners of the *Rona*

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the action came on to be heard before the judge of the City of London Court (Mr. Commissioner Kerr) on the 28th of April, 1881, and witnesses on behalf of the plaintiffs were then examined. From the evidence of these witnesses and from admissions made by the parties to the suit it appeared that the *Rona* had taken on board at New York a cargo of flour for delivery at the port of London under the terms of bills of lading, signed by the master of the *Rona*; that the cargo had arrived at the port of London, and had been delivered in a damaged condition, and that the plaintiffs were holders of the bills of lading, and sought to recover the damages they claimed by reason of the cargo having been delivered damaged in breach of the contract contained in the bills of lading. It further appeared to the satisfaction of the judge of the City of London Court that at the time of the institution of the suit a part-owner of the *Rona* was domiciled in England.

After hearing counsel on behalf of the plaintiffs and defendants, the judge of the City of London Court dismissed the suit on the ground that he had no jurisdiction to entertain it.

The plaintiffs appealed.

April 28. The appeal came on to be heard.

For the purpose of the appeal it was taken as admitted that the owners of the *Rona* were domiciled in England, and that the appellants were holders of the bills of lading and entitled to sue for any breaches of the contract therein contained.

Myburgh, Q.C., and *W. R. Kennedy*, for the plaintiffs.

Bucknill, for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

May 2. SIR ROBERT PHILLIMORE. This is an appeal from a decision of the judge of the City of London Court in an action in rem brought in the City of London Court by the holders of a bill of lading against the owners of the ship *Rona*, for damage to goods on board the *Rona*, alleged to have been caused by the negligence of the master during a voyage from New York to this country.

At the trial in the City of London Court it was contended by

the defendants that the action was brought under the Admiralty Court Act, 1861, and the County Courts Admiralty Jurisdiction Act, 1868, and that therefore, as an owner of the *Rona* was domiciled in England, the City of London Court had no jurisdiction. The learned judge, who considered himself bound by the judgment in the recent case of *Allen v. Garbutt* (1), dismissed the action for want of jurisdiction, and the plaintiffs have appealed to this Court.

It has been admitted, at least for the purposes of the appeal, that the owners of the *Rona* are domiciled in England, and that the jurisdiction of the City of London Court is the only question now to be decided. This question mainly depends upon the construction to be put on the following sections in three several Acts of Parliament. It is enacted by the 6th section of the Admiralty Court Act, 1861, that the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The 3rd section of the County Courts Admiralty Jurisdiction Act, 1868, provides that any Court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in the Act referred to as Admiralty causes) . . . "As to any claim for damage to cargo or damage by collision,—Any cause in which the amount claimed does not exceed three hundred pounds." Lastly, the 1st subsection of the 2nd section of the County Courts Admiralty Jurisdiction Act, 1869 (the full title of which Act it is important to observe is "An Act to amend the County Courts Admiralty Jurisdiction Act, 1868, and to give Jurisdiction in certain Maritime Causes") provides that "Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and

(1) 6 Q. B. D. 165.

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determine the following causes. . . . As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, . . . provided the amount claimed does not exceed three hundred pounds. . . .” The 3rd section of the same Act, provides that the jurisdiction conferred by the two Acts of 1868 and 1869, may be exercised either by proceedings in rem or by proceedings in personam.

The appellants who were plaintiffs in the Court below, contended that the action was brought under sub-s. 1 of s. 2 of the Act of 1869, and that therefore it came within the Admiralty jurisdiction of a county court, although in consequence of the exception in the 6th section of the Admiralty Court Act, 1861 (which I have already read), it would not have come within the jurisdiction of the High Court of Admiralty, unless brought thither by way of transfer, or by way of appeal.

I may say here, that the City of London Court by virtue of an Order in Council possesses the Admiralty jurisdiction of a county court, and that all the law relating to the Admiralty jurisdiction of county courts applies equally to the City of London Court.

I have been referred to several cases, which I have carefully examined, and which I think it expedient to mention in chronological order: *Everard v. Kendall* (1), decided in April, 1870; *The Dowse* (2), decided in June, 1870; *Simpson v. Blues* (3), decided in May, 1872, the decision in which it was admitted could now not be relied upon: *The Cargo ex Argos* (4), decided in the Admiralty Court in July, 1872, and on appeal, in February, 1873; *Brown v. The Master of the Alina* (5), decided in February, 1880; and, lastly, *Allen v. Garbutt* (6), decided in December, 1880.

The appellants supported their contention by citing the case of *The Cargo ex Argos* (4), a case which, like the present, arose on a bill of lading, and is so far directly in point, and *Brown v. The Master of The Alina* (5), which was decided in 1880 by the Court of Appeal and expressly approved of the case of *The Cargo ex Argos*. (4) On the other hand the respondents, defendants in the

(1) Law Rep. 5 C. P. 428.

(2) Law Rep. 3 A. & E. 135.

(3) Law Rep. 7 C. P. 290.

(4) Law Rep. 3 A. & E. 568; 5

P. C. 134.

(5) 5 Ex. D. 227.

(6) 6 Q. B. D. 165.

Court below, contended that the action was brought, not under the Act of 1869, but under the 3rd section of the Act of 1868, which section expressly mentions claims for "damage to cargo," and they argued that therefore as the High Court of Admiralty could have had no jurisdiction in such a cause (inasmuch as the owner's domicil was English), so neither can a county court have jurisdiction. They rely upon the authority of the case of *Allen v. Garbutt* (1), which, following the earlier cases of *Everard v. Kendall* (2) and *The Dowse* (3), decided that an action for "necessaries" which had clearly been brought under the Act of 1868, did not, where the owners of the ship were domiciled in England, come within the Admiralty jurisdiction of a county court. It was alleged on both sides that these decisions in the cases of *Brown v. The Master of The Alina* (4) and *Allen v. Garbutt* (1), are distinguishable, the former dealing with an action under the Act of 1869, the latter with one under the Act of 1868.

It is not necessary to consider whether these cases are reconcilable or not, because in fact, the issue is narrowed to this point:—Was the action against the *Rona* brought under the Act of 1868 alone, or under that of 1869, read and interpreted as one with the previous Act? It appears to me to follow from the arguments of the respondents, that the action could not properly have been brought under the Act of 1868, and I am of opinion that this is "a claim arising out of an agreement made in relation to the carriage of goods in a ship," and that the action clearly falls within the words of sub-s. 1 of section 2 of the Act of 1869.

I hold, therefore, that the City of London Court has jurisdiction, and that the appeal must be allowed.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Toller & Sons.*

(1) 6 Q. B. D. 165.

(2) Law Rep. 5 C. P. 428.

(3) Law Rep. 3 A. & E. 135.

(4) 5 Ex. D. 227.



ORDER IN COUNCIL,

Gazetted the 22nd of August, 1882.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

AT THE COURT AT OSBORNE HOUSE, ISLE OF
WIGHT,

the 18th day of August, 1882. -

PRESENT :

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 14th day of August, 1879, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the 1st day of September, 1880, the Regulations for Preventing Collisions at Sea, contained in an Order in Council dated the 9th day of January, 1863, and the additions by an Order in Council dated the 30th day of June, 1868, made thereto, should be annulled, and that there should be substituted therefor the New Regulations contained in the first schedule to the first-named Order in Council, and that the same should from and after the 1st day of September, 1880, apply to ships of the countries mentioned in the said second schedule thereto, whether within British jurisdiction or not.

And whereas, by Orders in Council, dated respectively the 24th of March, 1880, and the 26th of August, 1881, Her Majesty was

pleased to direct that the operation of the Article numbered 10 of the new Regulations contained in the first schedule of the said Order in Council of the 14th day of August, 1879, should be suspended until the 1st day of September, 1882, and that in lieu thereof and in substitution therefor the Article numbered 9 of the Regulations appended to the said Order in Council of the 9th day of January, 1863, should continue and remain in force until the said 1st day of September, 1882.

And whereas the Admiralty and the Board of Trade have jointly recommended to Her Majesty that the operation of the said Article numbered 10 should be further suspended until the 1st day of September, 1883, and that in lieu thereof and in substitution therefor the said Article numbered 9 shall continue and remain in force until the said 1st day of September, 1883.

Now therefore, Her Majesty, by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to direct, that the operation of the said Article numbered 10 of the new Regulations contained in the first schedule of the said Order in Council of the 14th day of August, 1879, shall be suspended until the 1st day of September, 1883, and that in lieu thereof and in substitution therefor the said Article numbered 9 of the Regulations appended to the said Order in Council of the 9th day of January, 1863, shall continue and remain in force until the 1st day of September, 1883.

C. L. PEEL.

ORDER IN COUNCIL.

Gazetted the 11th of January, 1881.

RELATING TO THE NAVIGATION OF THE RIVER MERSEY.

AT THE COURT AT OSBORNE HOUSE, ISLE OF
WIGHT,

the 5th day of January, 1881.

PRESENT :

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 27th day of June, 1866, Her Majesty, on the application of the Mersey Docks and Harbour Board being the harbour trust owning and exercising jurisdiction upon the waters of the River Mersey, and in the sea channels, and approaches thereto, was pleased to make certain rules set forth in the schedule thereto concerning the lights and signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters.

And whereas by an Order in Council made as aforesaid and dated the 14th day of August, 1879, Her Majesty was pleased to direct that the new "Regulations for Preventing Collisions at Sea," contained in the first schedule to the said Order should come into operation on the 1st day of September, 1880, and should be substituted for and in lieu of the "Regulations for Preventing Collisions at Sea" appended to the then existing Order in Council dated the 9th day of January, 1863.

And whereas by an Order in Council made as aforesaid and dated the 24th day of March, 1880, Her Majesty was pleased to direct that the operation of Article 10 of the said new Regulations should be suspended until the 1st day of September, 1881, and that there should be substituted therefor and in lieu thereof Article 9 of the said recited Order in Council of the 9th day of January, 1863.

And whereas the said Mersey Docks and Harbour Board have applied to Her Majesty in Council to make and have submitted for approval certain new rules (in which are embodied, subject to certain exceptions and additions therein mentioned, the said recited new "Regulations for Preventing Collisions at Sea") concerning the lights and signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating the said waters, to be substituted for and in lieu of the rules set forth in the schedule to the said recited Order in Council of the 27th day of June, 1866:

And whereas the new rules so submitted as aforesaid appear to be reasonable and proper:

Now, therefore, Her Majesty by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, doth hereby make the said new rules which are set forth in the schedule hereto, and Her Majesty doth hereby direct that the same shall come into operation on the 1st day of February, 1881, and shall be substituted for and in lieu of the rules set forth in the schedule to the said recited Order in Council of the 27th day of June, 1866, and that from and after the said 1st day of February, 1881, the said last-mentioned rules shall be and the same are hereby rescinded.

SCHEDULE.

RULES concerning the Lights or Signals to be carried, and concerning the steps for avoiding Collision to be taken by Vessels navigating the River Mersey.

1. Every vessel exceeding ten tons measurement, including river craft while navigating, or anchored, or moored in any part of the River Mersey, shall from and after the 1st day of February,

1881, observe and obey the new "Regulations for Preventing Collisions at Sea," as set out in the first schedule annexed to an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 14th day of August, 1879, and as varied and amended by an Order in Council made as aforesaid and dated the 24th day of March, 1880, with the exceptions and additions mentioned in the following rules.

2. Canal flats and all other vessels without masts, whilst being towed, shall carry the lights prescribed for sailing vessels by Article 6 of the said "Regulations for Preventing Collisions at Sea."

3. In addition to the lights for a steam vessel towing another vessel prescribed by Article 4 of the said Regulations, such steam vessel shall carry a bright white light shewing astern as a guiding light to the vessel or vessels being towed.

4. Instead of the light prescribed by Article 8 of the said Regulations, every vessel when at anchor in the River Mersey shall carry two white lights in globular lanterns of not less than eight inches in diameter, and so constructed as to shew a clear uniform and unbroken light visible all round the horizon for at least one mile, one of which lights shall be placed at a height not exceeding twenty feet above the hull on the forestay, or otherwise near the bow where it may best be seen, and the other at the main or mizen peak, or on the boom topping lift, or other position near the stern at double the height of the bow light before mentioned.

5. Instead of the light prescribed by Article 11 of the said Regulations, a bright white light, similar to the lights mentioned in Rule 4, shall be shewn continuously from the stern rail of every vessel while under way and in motion in all weathers, between sunset and sunrise.

6. A vessel anchored to mark the position of a wreck or other obstruction shall carry in all weathers, from sunset to sunrise, two bright white lights similar to those mentioned in Rule 4, which lights shall be placed horizontally on a cross yard on the foremast at a height not exceeding twenty feet above the hull, and twenty feet apart. And the said vessel shall carry in all weathers, between sunrise and sunset, two black balls placed as hereinbefore ordered with regard to the lights afore-mentioned.

ORDER IN COUNCIL,

Gazet'ed the 23rd of December, 1881.

RELATING TO THE NAVIGATION OF THE RIVER
HUMBER.

AT THE COURT AT OSBORNE HOUSE, ISLE OF
WIGHT,

the 19th day of December, 1881.

PRESENT :

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by the Merchant Shipping Act Amendment Act, 1862, it is provided that in the case of any Harbour, River, or other Inland Navigation, for which Rules concerning the Lights or Signals to be carried by vessels navigating the waters of any Harbour, River, or other Inland Navigation, or concerning the steps for avoiding collision to be taken by such Vessels, are not and cannot be made by or under the authority of any Local Act, it shall be lawful for Her Majesty in Council, upon application from the Harbour Trust, or Body Corporate, if any, owning or exercising jurisdiction upon the waters of such Harbour, River, or Inland Navigation, or if there is no such Harbour Trust or Body Corporate, upon application from Persons interested in the Navigation of such Waters, to make Rules concerning the lights or signals to be carried, and concerning the steps for avoiding collisions to be taken by Vessels navigating such waters; and such Rules, when so made, shall, so far as regards Vessels navi-

gating such waters, have the same effect as if they were Regulations contained in Table (C) in the Schedule to the said Act, notwithstanding anything in the said Act or in the Schedule thereto contained :

And whereas the Corporation of the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, being the Body Corporate owning and exercising jurisdiction upon the waters of the Rivers Humber, Ouse, and Trent, have applied to Her Majesty in Council to make certain Rules, which they have submitted for approval, concerning the Lights and Signals to be carried, and concerning the steps for avoiding collision to be taken by Vessels (except River Craft under 10 tons' measurement) navigating such waters :

Now, therefore, Her Majesty, by virtue of the powers in Her vested by the said recited Act, and by and with the advice of Her Privy Council, doth hereby make the said Rules, which are set forth in the Schedule hereto, and Her Majesty doth hereby direct that the same shall come into operation on the 1st day of March, 1882.

EDMUND HARRISON.

SCHEDULE.

Rules made by the Corporation of the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House, in Kingston-upon-Hull, concerning the Lights to be carried by Vessels (except River Craft under 10 tons' measurement) navigating the river Humber, and the Rivers Ouse and Trent, and concerning the steps for avoiding Collision to be taken by Vessels navigating such Waters.

1. All Vessels, as well Sailing Vessels as Steamers (except Dumb-Craft), while navigating, or anchored, or moored in the River Humber, or in any part of the River Ouse, at or below Goole, or in any part of the River Trent, at or below Gainsborough, shall observe and obey the "Regulations for Preventing Collisions at Sea," set out in the First Schedule annexed to an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 14th day of August,

1879, and as varied and amended by an Order in Council, made as aforesaid, and dated the 26th day of August, 1881, with the exceptions and additions made in the following Rules.

II. All vessels, as aforesaid, when at anchor in the River Humber, or in any part of the River Ouse, at or below Goole, or in any part of the River Trent, at or below Gainsborough, shall, between sunset and sunrise, instead of the light prescribed by Article 8 of the said Regulations, exhibit from the fore-stay, or otherwise near the bow of the vessel, where it can best be seen, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all round the horizon, at a distance of at least one mile; and in addition thereto, all Vessels having two or more masts shall exhibit another white light, at double the height of the bow light, at the main or mizen peak, or the boom topping lift, or other position near the stern, where it can best be seen.

III. Dumb-Craft shall, between sunset and sunrise, exhibit in the fore-part of the Craft a white light behind an opal frosted or ground colourless glass-shade, and distinctly visible on all sides, not less in height above deck or above any cargo or other obstruction on the deck:—

- (1.) When at anchor, than 5 feet;
- (2.) When being towed, than 3 feet; and the sternmost of the craft towed shall also exhibit a white light at the stern.

IV. Any Vessel which from unavoidable circumstances may be compelled to anchor in the fairway of the river shall, with as little delay as may be, remove to a proper roadstead or otherwise proceed on her course.

V. In interpreting these Rules, the term Dumb-Craft shall include Canal Boats, Mud Barges, and other Barges, Lighters, Vessels without masts, and Vessels without either deck or mast, Sloops and Keels with their masts lowered, and Rafts.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1883, will be as follows:—

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22 Ch. D.

In the Second Series,
10 Q. B. D. 8 P. D.

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3. — *Construction—Residue.*] The will of S. C. after bequeathing her property to A. C. and J. C., continued thus, "in case of the demise of either the said A. C. or J. C., I do hereby bequeath the same . . . to the survivor for her sole use and benefit during her or their natural lifetime":—*Held*, that the residue was not disposed of, and that A. C. and J. C. took only as tenants for life. *WATSON v. WATSON* - 10

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3. — *Maintenance—Dum Casta Clause.*] A deed had been executed securing a maintenance for the wife after the decree absolute. The deed did not contain a dum casta clause:—*Held*, that the Court had no power to set aside the deed by reason that the wife was no longer chaste. *BRADLEY v. BRADLEY* - - - - - 237

4. — *Wilful Neglect—Imprisonment for Criminal Offence.*] *Semble*, that the conviction of a wife for an offence against the criminal law is no justification for refusing further cohabitation with her, and that, if such refusal conduces to her adultery, the Court will not grant her husband a dissolution of his marriage. *WILLIAMSON v. WILLIAMSON* - - - - - 76

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6. — *Separation Deed—Covenant not to sue for greater Allowance—Subsequent Adultery—Permanent Alimony.*] A husband having committed adultery, disputes arose between him and his wife which led to his committing acts of legal cruelty. A separation deed was then executed, by which he agreed to allow her 250*l.* a year, and to maintain the two youngest children, who were not to be in her custody; and she covenanted not to take any proceedings to compel the husband to allow her a larger amount of alimony. Subsequently the husband committed adultery, and the wife obtained a decree for judicial separation and an order that she should have the custody of the two youngest children. The husband had since the date of the separation deed become wealthy, and the wife applied for an inquiry as to his means with a view to obtaining increased alimony:—*Held*, by the Court of Appeal, reversing the previous case, that increased alimony could not be ordered, for that as the Court had not, as it would have had in the case of a decree of dissolution, power to alter the separation deed, the covenant by the wife not to sue for increased alimony was binding on her, and must have effect given to it, the husband not having, in the opinion of the Court, been guilty of such misconduct as under the circumstances of the case would disentitle him to claim the benefit of the deed. *GANDY v. GANDY* - C. A. 168

7. — *Unreasonable Delay.*] A husband in 1878 obtained a judicial separation and 50*l.* damages by reason of his wife's adultery. The wife continued to cohabit with the adulterer, and the husband in 1882 petitioned for a dissolution of his marriage:—*Held*, that he had been guilty of unreasonable delay. Petition dismissed. *MASON v. MASON* - - - - - 233

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2. — *Attachment of Debt—Judicature Act, 1873, s. 25, subs. 8.*] Under subs. 8 of s. 25 of the Judicature Act, 1873, the Court of Divorce has power to attach a debt due to a respondent in order to compel obedience to an order of that Court for payment of costs. *WHITTAKER v. WHITTAKER* 15

3. — *Respondent's Costs—Full Costs.*] In a divorce suit the usual order had been obtained for securing the wife's costs of the hearing, and there had been no appeal from that order and no further costs were asked for at the hearing. Subsequently the case of *Robertson v. Robertson* (6 P. D. 119) was decided in the Court of Appeal, and the Divorce Court was thereupon asked to order payment of the wife's full costs. Application refused.—In future, if in a divorce suit in which a wife is found guilty the Court is asked to order payment of her full costs, the Court will postpone its decision until after her bill of costs has been taxed.—The case of *Robertson v. Robertson* (6 P. D. 119) referred to. *SMITH v. SMITH* [84

4. — *Costs, Security for—Bankruptcy of Petitioner.*] In a petition for dissolution of marriage, the husband, who was an uncertificated bankrupt, claimed damages. Upon application by the co-respondent:—*Held*, that unless the claim for damages was withdrawn the petitioner must give security for the costs of the action. *SMITH v. SMITH* - - - - - 227

5. — *Divorce—Petition—Co-respondents.*] If a petition alleges adultery with persons unknown the order of the Court must be obtained dispensing with making them co-respondents, notwithstanding that there are already other co-respondents who have been served with process. *PENTY v. PENTY* - - - - - 19

6. — *Settlements, Variation of—Petition—Signature.*] A petition for variation of settlements must usually be signed by the petitioner, but the Court will, under special circumstances, allow his solicitor to sign it on his behalf. *ROSS v. ROSS* - - - - - 20

7. — *Settlements, Variation of—Lis pendens—Rights of Third Parties—Charge for Solicitor's Costs.*] Upon a petition for variation of settlements, the Court has power to make an order in favour of the interest of third parties created be-

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fore the filing of that petition.—Until a decree has been made for dissolution of a marriage, there is no *lis pendens* with reference to the property included in the marriage settlements.—Before a decree nisi was made for dissolution of the marriage, the respondent had charged his interest under the marriage settlement with payment of his solicitor's costs of suit:—*Held*, that, under the circumstances, the charge was valid and that the respondent's interests could not be extinguished without providing for this charge. *WIGNEY v. WIGNEY* - - - - - 228

8. — *Settlements, Variation of*—22 & 23 *Vict. c. 61, s. 5*—41 *Vict. c. 19, s. 3*.] The fortune of a wife was settled as to a part producing 950*l.* a year on the husband for life, then on the wife for life; as to the residue producing 1200*l.* a year on the wife for life, then on the husband for life; and after the decease of the survivor, in default of children of the marriage, then as to the whole property on such trusts as the wife should by will appoint, and in default of appointment to the husband absolutely. There was no child of the marriage. The wife obtained a decree for dissolution of the marriage on the ground of adultery and cruelty. The husband had mortgaged his life interest for debts incurred in keeping up the joint establishment, and alleged that he had incurred other debts for the same purpose. The President of the Divorce Court, upon the wife's petition, made an order that the trustees of the settlement should stand possessed of all the funds upon the trusts which would be applicable thereto if the husband was dead, and had died in the lifetime of the wife, and free from the ultimate trust

PRACTICE—continued.

in default of appointment, but subject to the wife undertaking to pay the charges made by the husband on the trust funds:—*Held*, on appeal, that the order must be affirmed, with this variation, that an account should be taken of all debts due from the husband incurred for the purpose of the joint establishment, and that the wife must undertake to pay them.—Though the power given to the Court of varying settlements is not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them respectively.—The judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property, and the Court of Appeal will not interfere with that discretion, unless there has been a clear miscarriage in its exercise. *WIGNEY v. WIGNEY* [C. A. 177

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2. — *Faculty—Judicial Discretion—Opinion of Parishioners—Matters of Taste and Fancy.*] Where the incumbent and churchwardens with the approval of the vestry apply for a faculty for alterations in their parish church, and the grant or refusal of the faculty is merely a matter for the discretion of the ordinary, the faculty ought not to be granted unless it is proved to the satisfaction of the ordinary that if the proposed alterations are carried out, the church will be thereby rendered more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate or more adequate to its purposes, or that there exists either on the part of the parishioners generally, or of the parishioners actually attending the church, a general desire in favour of the faculty being granted. *PEEK v. TROWER* - - - - - 21

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4. — *Public Worship Regulation Act, 1874* (37 & 38 Vict. c. 85), s. 8—*Locus standi of Complainant—Representation made by Churchwarden ceasing to be Churchwarden after Date of Representation—Refusal of intervention or substitution of new Parties—Practice.*] The complainant in the matter of a representation under the Public Worship Regulation Act, 1874, in which the in-

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cumbent of a parish church was the party complained of, was at the time of the making of the representation one of the churchwardens of the parish, and continued in his office as churchwarden until after an inhibition had issued in the suit inhibiting the incumbent from performing divine service within the diocese. Subsequently to the issue of this inhibition another person was elected as churchwarden in the place of the complainant, and the complainant ceased to reside in the parish. Afterwards the newly appointed churchwarden applied to the Court by motion for leave to intervene in the suit or to be substituted as party therein in place of the complainant. The Court refused the motion. **PERKINS v. ENRAGHT**

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2. — *Foreign Ship—Law of the Flag.*] The owner of cargo who ships it on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag, that is the law of the country to which the vessel belongs, unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond made by the master of a foreign ship hypothecating cargo laden on board such ship, if valid according to the law of the flag of the ship, will be enforced by the English Admiralty Court, on the arrest of the ship and cargo at the Port of London (the port of discharge within the meaning of the bond), although the conditions imposed by English law as essential to the validity of such bond have not been complied with. **THE GAETANO AND MARIA** - - - - **C. A. 137**

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gerous by sunken Vessel—Vessel sunk by Collision for which her Owner alone to blame—Negligence—Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16), s. 4—Act done in course of Duty—Warning to Harbour-master—Hearsay Evidence—Wrongful Rejection of Evidence.] The *D.* in consequence of the sole default of her master and crew had sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel without any fault on the part of those on board her came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the *D.*, the judge at the trial refused to admit the evidence shewing that the mate of the *D.* had sent a message to the harbour-master, and that the latter had promised to light the wreck:—*Held*, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. **THE DOUGLAS - C. A. 151**

2. — *Collision with Pier—Non-liability of Shipowners for negligence of Pilot in charge by compulsion of Law—Harbours Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74—The New Brighton Pier Act, 1864 (27 & 28 Vict. c. lxxvii.), ss. 2, 39—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 388.]* The 74th section of the Harbours Piers and Clauses Act, 1847, which Act is incorporated with the New Brighton Pier Act, 1864, save and so far as any of the clauses and provisions of the two Acts are inconsistent, declares that the owner of every vessel shall be answerable to the undertakers of every pier to which the Harbours Docks and Piers Clauses Act, 1847, is applied, for any damage done to such pier, but provides that nothing therein contained shall extend to impose any liability for such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ. By the 39th section of the New Brighton Pier Act, 1864, it is enacted that if any person having the care of any ship shall wilfully or carelessly cause, permit, or suffer any damage or injury to be done to the New Brighton Pier then and in every such case the owners of every such ship shall be answerable and liable to make satisfaction to the New Brighton Pier Company for all such damage or injury. A steamship came into collision with and did damage to the New Brighton Pier, and to recover for the damage so done the New Brighton Pier Company brought an action against the steamship. The owners of the steamship alleged in their statement of defence that at the time the damage was done the steamship was in charge of a pilot employed by compulsion of law; that the collision was not caused or contributed to by the negligence of the defendants or any other persons than the pilot of the steamship, and that the damage was not permitted or suffered by any persons having the care

DAMAGE—*continued.*

of the steamship within the meaning of the New Brighton Pier Act, 1864. The plaintiffs demurred to these allegations in the statement of defence:—*Held*, that the provisions of the New Brighton Pier Act, 1864, did not preclude the defendants from setting up the defence of compulsory pilotage and that the demurrer must be overruled. **THE CLAN GORDON - 190**

3. — *Compulsory Pilotage—London Trinity House District—Foreign Vessels carrying Passengers from London to Hamburg—Pilotage Act, 1825 (6 Geo. 4, c. 125), s. 59—Pilotage Amendment Act, 1853 (16 & 17 Vict. c. 129), s. 21—Order in Council, February, 18th, 1854—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 353, 370, 376, 388—Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), s. 10.]* Sections 353 and 376 of the Merchant Shipping Act, 1854, render foreign vessels trading with cargo and passengers from the port of London to ports between Boulogne and the Baltic subject to compulsory pilotage on their outward passages between London and Gravesend, unless their masters or mates have pilotage certificates from the London Trinity House; and the operation of these sections, so far as such vessels are concerned, is not affected either by the Order in Council of February 18th, 1854, or by the provisions contained in the Harbours and Passing Tolls Act, 1861.—*The Hanna* (Law Rep. 1 A. & E. 283) followed. **THE VESTA 240**

4. — *Pilot compulsorily taken on Board but not compulsorily in Charge—Liability of Shipowner for Collision in Suez Canal solely caused by Negligence of Suez Canal Company's Pilot.]* Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal Company's pilot compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damages arising out of the collision.—*Semble*, the effect of the Regulations for the Navigation of the Suez Canal is to constitute the pilot taken on board a ship traversing the canal the adviser of the master, and to leave the control of the navigation of the ship solely with the master. **THE GUY MANNERING 52**

5. — *Pilot compulsorily taken on Board but not compulsorily in Charge—Liability of Shipowner for Collision in Suez Canal solely caused by negligence of Suez Canal Company's Pilot.]* Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal Company's pilot compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damage arising out of the collision.—The effect of the Regulations for the Navigation of the Suez Canal is to constitute a pilot taken on board a ship traversing the canal the adviser of the master, and to leave the control of the navigation of the ship solely with the master. **THE GUY MANNERING - C. A. 132**

6. — *Construction of Tees Conservancy Regulations—"Maximum Speed of Six Miles per Hour."* The 22nd clause of the bye-laws of the River Tees, which provides that no steamship shall be navigated on any part of the river Tees at a higher rate of speed than six miles per hour, is to be construed as prohibiting a steamship pro-

DAMAGE—*continued.*

ceeding against the tide being navigated at a greater speed than six miles per hour through the water. *THE R. L. ALSTON* - - - 49

7. — *Duty of Vessels anchored in Track of Launch—Compulsory Pilotage—The Mersey Docks Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 139—Meaning of "Proceed to Sea."* A barque was at anchor in the Mersey in the way of the *C.*, a vessel about to be launched. The launch was delayed as long as was prudent, but the barque not having been got out of the way in time was struck by the *C.* in coming off the ways and both vessels were damaged. Reasonable notice had been given of the launch, and a steam-tug had been sent by those superintending the launch to tow the barque out of danger, and would have done so in time to have prevented the collision but for the obstinacy of those on board the barque:—*Held*, that the barque was alone to blame for the collision.—The barque had been towed out of dock into the river the previous day in order that she might proceed to sea before day-break on the morning on which the collision happened. But an accident having happened to the mainyard of the barque she was unable to proceed to sea as intended, and at the time of the collision was waiting in the river to have repairs executed. She had on board of her a duly licensed Mersey pilot:—*Held*, that she was not at the time of the collision proceeding to sea within the meaning of the Mersey Docks Consolidation Act, 1858, s. 139, and that the pilot on board her was not at the time employed by compulsion of law.—*Rodrigues v. Melhuish* (10 Ex. 110) followed. *THE CACHAPOOL* - - - 217

8. — *Regulations for Preventing Collisions at Sea, Art. 11.* A ship does not, by carrying a fixed white binnacle light in such a position as to be reflected astern, comply with the provisions of the eleventh article of the Regulations for Preventing Collisions at Sea, which provides that a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light. *THE BREADALBANE* - - - 186

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PILOT—Liability of shipowner for collision 132
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PRACTICE—*Salvage—Adequate, but illiberal Tender—Costs.* In a case of salvage, in which the defendants pleaded a tender and payment into Court of 300*l.*, the Court pronounced for the tender and condemned the defendants in costs up to the time of payment into Court, but made no order as to the costs incurred after that time. *THE LOTUS* - - - 199

2. — *Collision—Both Ships to blame—Costs of Reference.* Where in an action of damage the defendant sets up a counter-claim relating to the collision in respect of which the action is brought, and both ships are held to blame, and a reference is ordered to ascertain the amount of damage sustained by each ship, each party is, as a general rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed. *THE MARY* - - - 201

3. — *Damage to Cargo—Particulars.* The rule as to giving the opposite party particulars of any general allegation in pleadings ought to be the same in the Admiralty as in the Queen's Bench Division. Where, therefore, in an action in the Admiralty Division by cargo owners against shipowners for delivery of cargo in a damaged condition, the statement of claim alleged that the damage was not occasioned by any of the excepted perils mentioned in the bill of lading under which the cargo has been shipped, but was occasioned by the defective condition of the vessel or by the negligence or breach of duty of the defendants or their servants, it was *held* by the Court of Appeal (Lord Coleridge, C.J., and Brett and Holker, L.JJ.), reversing the decision of Sir Robert Phillimore, that the defendants were entitled to particulars of the defects rendering the vessel not fit to carry the cargo. *THE RORY*

[C. A. 117

4. — *Damage—Refusal to amend Preliminary Act.* The Court will refuse to allow a mistake in a preliminary act to be amended, even though the application for an amendment be made before the hearing of the suit and be supported by affidavit. *THE MIRANDA* - - - 185

5. — *Writ in Personam—Incorrect Address of Defendant—Refusal of Consolidation Order before service of Writ.* The Court will refuse to consolidate cross actions of damage in personam where there has been no service of the writ in the principal action.—A shipowner, residing and carrying on business in Scotland, having been described on the face of a writ of summons for service within the jurisdiction sued out against him in an action of damage in personam as "of the city of London" applied before service of the writ and after a cross action of damage in respect of the same collision had been instituted on his behalf that the writ should be set aside. The Court refused the motion. *THE HELENSLEA*. *THE CATALONIA* - - - 57

SAILING RULES—Article 11 - - 186See **DAMAGE**. 8.— **Tees Conservancy regulations** - - 49See **DAMAGE**.

SALVAGE—*Appeal from Justices—Jurisdiction—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 2, 458, 460—Meaning of "Ship or Boat stranded or in Distress on the Shore of any Tidal Water."* Justices awarded salvage in respect of services rendered to a hopper barge, which had been found adrift without any person on board of her, in the Wash, about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes. There was no evidence that she was employed in navigation:—*Held*, that the barge was not a ship or boat within the meaning of the Merchant Shipping Act, 1854, s. 458, and that the justices had acted without jurisdiction.—*The Leda* (Swa. 40) followed. **THE MAC**

[38

2. — *Appeal from Justices—Jurisdiction—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 2, 458, 460—Meaning of "Ship or Boat stranded or otherwise in distress on the Shore of any Sea or Tidal Water."* Justices awarded salvage in respect of services rendered to a hopper barge, which had been found adrift without any person on board of her in the Wash about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes:—*Held*, that the barge was a "ship in distress on the shore of a sea or tidal water" within the meaning of the Merchant Shipping Act, 1854, s. 458, and that the justices had jurisdiction to award salvage.—*The Leda* (Sw. 40) followed. **THE MAC C. A 126**

3. — *Award—Apportionment.* In a suit instituted to recover salvage reward in respect of services rendered in towing a disabled vessel into safety, the Court awarded a total sum of 4000*l.*, of which 3000*l.* was apportioned to the owners. **THE KENMURE CASTLE** - - - 47

4. — *Constructive Acceptance of Salvage Service—Service rendered to Two Vessels in Collision with each other.* Where two vessels are in collision and are entangled together in a position dangerous to both, salvors who, by towing one of the vessels clear, free both vessels from danger, are entitled to recover salvage reward from the owners of both vessels.—A screw steamship drifted, during a gale of wind, across the bows of a ship at anchor in the Mersey, and with her propeller caught the anchor chains of the ship, and the two vessels were held together in a position dangerous to both. A steam-tug went to the assistance of the ship, and held her whilst her chains were slipped and towed her clear of the steamship:—*Held*, that the owners, master, and crew of the tug were entitled to recover salvage reward from the owners of the steamship. **THE VANDYCK** - - - 42

5. — *Misconduct of Salvors diminishing amount of Reward.* Violent and overbearing conduct on the part of salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, will yet operate to induce the Court to diminish the amount of the reward. **THE MARIE** - 203

SALVAGE—*continued.*— **Practice**—Amount of tender—Costs - 199See **PRACTICE**.

SHIP—*Derelict—Right to Freight after abandonment of Ship.* By the abandonment of a ship by its crew during a voyage, without any intention to retake possession, a right is given to the owner of cargo on board to treat the contract of affreightment as at an end.—A ship with a cargo of resin in barrels, on a voyage from America to Rotterdam, was, owing to the perils of the sea, abandoned by her crew off the American coast. She was afterwards saved by another vessel, and brought with her cargo by the salvors into a port in England, and there arrested in an action for salvage by her salvors. Before the shipowner had released the ship or cargo, the owners of the cargo applied for and obtained from the Admiralty Court an order for the release of the cargo to them without payment of any freight, upon their giving bail to the salvors:—*Held*, that the cargo owners were entitled to treat the contract of affreightment as at an end, and that therefore the order of the Admiralty was rightly made. **THE CITIO** - - - **C. A. 5**

SHIPPING CASUALTY—*Investigation—Appeal—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432—"Wrongful act or default"—Fresh Evidence on Appeal—Costs.* On a shipping casualty appeal where it is desired to adduce fresh evidence at the hearing of the appeal, application for leave to do so should be made to the Court of Appeal by motion prior to the hearing of the appeal.—An error of judgment on the part of the master of a vessel at a moment of great difficulty and danger does not amount to a wrongful act or default, within the meaning of the 242nd section of the Merchant Shipping Act, 1854, so as to justify the suspension or cancellation of the master's certificate.—On a successful appeal the Board of Trade having appeared in support of the decision appealed from were directed to pay the costs of the appeal. **THE FAMENOTH** 207

2. — *Investigation—Appeal—Shipping Casualties Investigations Act, 1879 (42 & 43 Vict. c. 72), s. 2.* A shipowner, who has appeared as a party at the hearing of an investigation under the Merchant Shipping Acts into the circumstances attending the loss of a ship owned by him, has no right of appeal, notwithstanding that the tribunal investigating the case has given a decision suspending the certificate of the master of the ship, and condemning the shipowner in costs.—The Wreck Commissioner, having been requested to hold an investigation into the loss and abandonment of a British ship, found that the loss of the ship was due to certain improper ballast taken on board her at an English port having been converted into mud by mixture with the water made by her during the voyage, and so choking the pumps that they could not be used, whereby the ship foundered, and for these wrongful acts and defaults suspended the certificate of the master of the ship for three months. The master appealed.—The Probate, Divorce, and Admiralty Division being of opinion that the evidence before the Wreck Commissioner established that the master had authority from his owner to provide ballast for the vessel without restriction as to

SALVAGE—*continued.*

price, and had been aware of the character of the ballast which she had taken on board, and that the carrying of such ballast contributed to her loss, dismissed the appeal with costs. **THE GOLDEN SEA** - - - - - 194

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